UNIONIZATION THROUGH REGULATION: THE NLRB'S HOLDING PATTERN ON FREE ENTERPRISE

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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UNIONIZATION THROUGH REGULATION: THE NLRB'S HOLDING PATTERN ON FREE ENTERPRISE

FRIDAY, JUNE 17, 2011

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
North Charleston, SC.

The committee met, pursuant to notice, at 12:05 p.m., at the Charleston County Council Chambers, the Lonnie Hamilton Building, 4045 Bridge View Drive, North Charleston, SC, Hon. Darrell E. Issa (chairman of the committee) presiding.

Present: Representatives Issa, Gowdy, Ross, Farenthold, Maloney, Norton, Kucinich, and Braley.

Also present: Representatives Wilson and Scott.

Staff present: Robert Borden, general counsel; John Cuaderes, deputy staff director; Linda Good, chief clerk; Christopher Hixon, deputy chief counsel, oversight; Justin LoFranco, deputy director of digital strategy; Jeff Solsby, senior communications adviser; and Sharon Meredith Utz, research analyst.

Chairman ISSA. Can I ask everyone to please be seated? This committee will come to order.

Before we begin, I know a lot of people out there came from far and wide to be here. The only thing I would ask is that you respect that there are no winners, no losers, no right side, and no wrong side in a congressional hearing. So I hope you will understand that we don't want to hear boos. We don't want to hear applause. If you will do that for us, we would sure appreciate it.

Additionally, it is a normal rule of this committee that there is only an opening statement for the chairman and ranking member, and that is tradition. What we are going to do, though, is do an opening statement for chairman and ranking member, and then I am asking unanimous consent for additional 2 minutes for each Member that wants to make an opening statement.

Without objection, so ordered. And we will begin.

The Oversight Committee mission is to secure fundamental principles. First, Americans have a right to know that the money Washington takes from them is well spent. And second, Americans deserve an efficient, effective Government that works for them. Our duty on the Oversight and Government Reform Committee is to protect these rights.

Our solemn responsibility is to hold Government accountable to taxpayers because taxpayers have a right to know what they get from their Government. We will work tirelessly, in partnership

with citizen watchdogs, to deliver the facts to the American people and bring genuine reform to the Federal bureaucracy.

I would ask unanimous consent that two colleagues from South Carolina, Mr. Joe Wilson and Mr. Tim Scott, who are not members of the committee, be allowed to participate fully today.

Without objection, so ordered.

I want to begin by thanking the Charleston County Council, whose facilities are being so generously provided today, for their help in making this hearing possible.

And Mr. Scott, I want to thank you for the use of your chair, which you once filled here in that role.

I also want to recognize Mr. Gowdy, an active member of this committee and someone who has spotlighted this behavior and this issue from the time AmericanJobCreators.com became directly aware of it.

Today's hearing is about the effect that NLRB's acting general counsel's decision to bring suit against the Boeing Co. is having on thousands of jobs in South Carolina. It is the fundamental responsibility of the National Labor Relations Board to protect the rights of employees and employers and to prevent practices that will harm the general welfare of workers, businesses, and the U.S. economy.

It is this chair's opinion that on all of these points, NLRB action may have failed. The jobs of thousands of workers at what is today a nonunion worksite in South Carolina are at risk.

The investment Boeing put into the South Carolina facility, valued at more than $1 billion, is now in jeopardy, and production of portions of 835 planes, most of which will be exported, that have already been ordered is now in jeopardy. Timely delivery is essential, and without this facility, it is unlikely commitments will be met.

And finally, Mr. Solomon's decision, which has been described in ways that I am going to leave out of my opening statement, could, in fact, lead to repercussions in America's competitiveness and in decisions by other businesses to locate in right-to-work States or, in fact, foreign companies to locate in America at all.

Often, when you believe that you are helping one party, you may be hurting the party you intend to help. Seattle's economy, which is very good in aerospace, may be hurt by decisions not to allow new facilities be put there in the future for fear that they could not be expanded on in the future in other areas.

As an entrepreneur and business owner myself, I know well the decisionmaking process that goes into decisions about where to locate a plant, warehouse; when to hire employees; and what to invest to grow your company and jobs.

Evidence suggests Boeing's decision to build the new assembly plant in South Carolina was simply an act of managerial discretion and not an effort to discourage employees from engaging in protected activities under the National Labor Relations Act. If Boeing's actions were lawful and proper and made on the basis of multiple factors and in the best interest of the company, its workers, and the people of South Carolina, then why has the NLRB acting general counsel sued them?

Moreover, how can the President expect the private sector to create jobs and put Americans back to work if his appointees continue to use the regulatory process to keep putting impediments in their path? Why would the administration stand in the way of reindustrialization of the American work force and strengthening one of the major industries where we still have a competitive global advantage?

Any appearance that Mr. Solomon's decision was tailored to reward the President's powerful financial and political supporters—big labor—would be disturbing. The American people deserve to know if so-called independent regulatory agencies are exceeding their legal authority to pursue a partisan agenda.

And finally, I want to make the point about the difficulty the committee had in securing Mr. Solomon as a witness. Fortunately, he is here today. And for that, I thank you.

But he is here because of a compulsory process, and I am increasingly concerned that the use of subpoena, which has not been historically needed, may be a sign that there is a constitutional challenge forming between the Congress's legitimate oversight and the executive branch, including their quasi-independent agencies.

And with that, I recognize the gentlelady from New York for her opening statement.

[The prepared statement of Hon. Darrell E. Issa follows:]

Chairman Issa Opening Statement Talking Points

NRLB Hearing

June 17, 2011

- I want to begin by thanking the Charleston County Council for allowing us to use these chambers for today's hearing.

- I also want to thank my colleague, Mr. Gowdy, for his leadership and efforts to protect jobs in South Carolina and spotlight the abusive behavior of federal regulators.

- Today's hearing is about the effect that the NRLB's acting general counsel's decision to bring suit against The Boeing Company is having on thousands of jobs in South Carolina.

- It is the fundamental responsibility of the National Labor Relations Board to protect the rights of employees and employers and to prevent practices that harm the general welfare of workers, businesses, and the U.S. economy.

- On every point, it appears that NRLB has failed.

- The jobs of thousands of workers at non-union worksites in South Carolina are now at risk.

- The investment that Boeing put into the South Carolina facility – valued at more than $1 billion – is now in jeopardy, and production on 865 planes – most of which are for export – that have already been ordered is now in limbo.

- And finally, Mr. Solomon's decision – which has been described as "loony," "militant," "retaliatory," "unmerited," "unprecedented," and "the most politicized" decision in NRLB's history – will doubtlessly cause collateral damage on the free movement of business and capital in the United States.

- As an entrepreneur and business owner myself, I know well the decision-making process that goes into decisions about where to locate a plant, when to hire employees, and what to invest to grow a company and create jobs.

- Evidence suggests that Boeing's decision to build the new assembly plant in South Carolina was simply an act of managerial discretion and not an effort to discourage employees from engaging in protected activities under the National Labor Relations Act.

- If Boeing's actions were lawful and properly made based on multiple factors and in the best interest of the company, its workers, and the people of South Carolina, then why has the NRLB's acting general counsel sued them?

- Moreover, how can the President expect the private sector to create jobs and put the American people back to work if his appointees continue to use the regulatory process to keep putting impediments in their path?

- Why would the administration stand in the way of re-industrializing the American workforce and strengthening one of the major industries where we still maintain global superiority?

- Any appearance that Mr. Solomon's decision was tailored to reward the president's powerful financial and political supporters in Big Labor is disturbing.

- The American people deserve to know if so-called independent regulatory agencies are exceeding their legal authority to pursue a partisan political agenda.

- And finally, I want to make a point about the difficulty the Committee had in securing Mr. Solomon as a witness today. Fortunately, he is here today without the need for a compulsory process. But I am increasingly persuaded that the administration is contemptuous of congressional oversight and determined to delay or derail our constitutional responsibility.

- With that, I yield to the Ranking Member for his opening statement.

###

Mrs. MALONEY. Thank you so much, Mr. Chairman.

And I thank all my colleagues for being here. It is wonderful to be in South Carolina, in Charleston. And welcome to all of our witnesses.

We are gathered here today at a time when employment is the most crucial issue facing our country. Roughly 13½ million Americans are unemployed. The labor force participation rate is still at a low not seen in over a generation.

The focus of our inquiry today should be how Republicans and Democrats can work together to encourage businesses to invest and put Americans back to work in South Carolina and elsewhere in this country.

This case is not about creating jobs in South Carolina. This case is not about Everett, Washington, workers against Charleston workers. This case is about a company thinking it is above the law because it is a multibillion dollar, multinational corporation.

If Boeing moved jobs into a nonunion factory 10 miles down the road from its Everett plant because workers have protested working conditions, its decision would be just as illegal. But that is not why we are here. Instead, this hearing actually concerns the economic consequences of a potential illegal act allegedly committed by the Boeing Co. and the legitimate law enforcement action taken this week by the National Labor Relations Board to sanction it.

At issue in the Boeing case is whether Boeing illegally retaliated against American workers for engaging in activity that Congress has chosen to protect since 1935 and FDR, the right to protest. No worker benefits for allowing a company to explicitly break the law.

Just as it is illegal to discriminate against workers based on their race or gender, it is also illegal to make business decisions that discriminate against workers for exercising their legal rights. The protected rights at stake in the Boeing case apply to workers regardless of whether or not they are unionized, whether or not they live in South Carolina or anywhere in our great Nation, and, of course, regardless of politics.

Boeing is a very important company to our country. With its workers, they make outstanding products. They export. They are our biggest exporter.

I support creating great jobs and reducing unemployment across the United States, but I also believe that Boeing is not above the law. And as Members of Congress, we should not set aside the law to give preferred treatment to any one company.

The NLRB is part of our justice system, and it should be given the opportunity to do justice in the Boeing case. That is the only way to ensure that all workers, even those here working for Boeing in South Carolina, are protected.

That is why I am very concerned about the timing of this hearing and the chairman's insistence on it and his insistence that Mr. Lafe Solomon, the general counsel and chief prosecutor of the case, testify while the Boeing hearing is currently underway. His testimony today raises serious concerns about the due process rights of litigants and the integrity of the Boeing proceeding.

Mr. Chairman, as you know, I am a strong believer in the importance of congressional oversight. But I do not believe that we should interfere with active prosecutions under the guise of over-

sight. We must act prudently and respect the judicial process. I hope that you will exercise your discretion as chair of the committee and direct the Members today to avoid asking questions of Mr. Solomon which could, in any way, put a fair trial and due process at risk.

If you do not, I believe you may, intentionally or not, permit the legal process to be tainted by political interference. This simply does not serve any legitimate goal of this committee or the U.S. Congress.

If, however, you take steps to protect the integrity of the legal process and prevent an appearance, then I am confident that today's hearing can shed some light on how to ensure that all workers, whether in South Carolina or anywhere else in our great country, can find employment and continue to have the ability to bargain for rights and engage in protected activity.

Today, the middle class is in serious decline with wages for the majority of workers stagnant and increasing numbers of workers without access to health insurance and pension benefits. There is no question that unions have contributed to building the middle class in our country.

For instance, according to the Federal Bureau of Labor Statistics, union workers are more likely than nonunion workers to be covered for health insurance and receive pension benefits and paid sick leave. We cannot ignore the critical role that unions have played in building America by helping improve the wages and working conditions of union and nonunion jobs alike.

In closing, I want to emphasize again that this hearing puts at risk trying to use politics to influence the work of an independent Federal agency. To intimidate is to affect the outcome of a judicial proceeding. This is very dangerous to our democracy. If we believe in the rules of law, we have to be governed by due process institutions have created to resolve these issues in a fair manner.

Again, I thank you for yielding to me and for calling this hearing.

Chairman ISSA. I thank the gentlelady.

We now recognize a local hero, Mr. Gowdy.

Mr. GOWDY. Thank you, Mr. Chairman, for your leadership in this area.

I also want to thank my colleagues, those that are in the audience—our colleagues from State government; speaker of our house; Attorney General Henry Brown, who served so ably in Congress for many years; my two colleagues who are on the dais with me, Representative Wilson, Representative Scott; and we speak on behalf of those of our colleagues who are not here.

With that in mind, Mr. Chairman, I would ask unanimous consent to place two letters from our Senators—Senator Graham and Senator DeMint—into the record.

Chairman ISSA. I have them. Without objection, so ordered.

[The information referred to follows:]

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UNITED STATES SENATE

June 17, 2011

Chairman Darrell Issa
United States House of Representatives
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

Mr. Chairman,

I appreciate you holding this hearing and hope it can shed light on the frivolous complaint filed by the National Labor Relations Board (NLRB), acting at the behest of Acting General Counsel Lafe Solomon, against The Boeing Company. As a South Carolinian you can only imagine the frustration the citizens of our state feel about the unprecedented actions taken by the NLRB.

Last Friday, I was in Charleston and at the new $750 million Boeing facility as we declared it open for business. The event was a celebration of innovation and potential. Boeing's revolutionary Dreamliner aircraft has the ability to change commercial aviation; their manufacturing facility will change the face of North Charleston and the region. However, as evidenced by the need for this hearing, all of this is threatened by the actions of the NLRB. Instead of spending millions of dollars investing in both Washington and South Carolina to build airplanes that will be sold around the globe, Boeing is now forced to spend millions of dollars to defend itself in court.

With the national unemployment rate stuck at around nine percent and South Carolina's hovering even higher, job creation remains at the top of my priority list. I know many on the Committee have it as their top priority as well. At a time when we desperately need for companies to expand and succeed in America, the NLRB complaint sends a terrible message to our business leaders.

Boeing is being treated unfairly; and if the NLRB has its way, thousands of workers in South Carolina will be forced pay the price for these frivolous actions. South Carolinians will lose their jobs, health care coverage, retirement contributions and other benefits of employment directly as a result of the actions of the NLRB. This is hardly in line with the NLRB's mission to protect the rights of workers.

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I remain particularly amazed by the complaint because the NLRB is trying to remedy a wrong that never existed. Boeing's collective bargaining agreement with the International Association of Machinists and Aerospace Worker Union (IAM) expressly authorizes the company to locate new work at locations of its choosing without bargaining with the IAM.

Boeing, in an act of good faith -- went beyond the details of the contract and voluntarily entered into discussions with the IAM. However, South Carolina offered Boeing a better deal and they ultimately chose our state as the location for their second 787 Dreamliner assembly line.

Mr. Chairman, we have earned the ability to build these planes in South Carolina and nobody should take that right away from our state but let's take a moment to consider the bigger issue.

The first rule of good governance is to do no harm. As this case proceeds, we run the risk of doing a lot of harm -- not just to Boeing and its workers, but to every business looking to locate or expand operations in the United States.

Companies are not required to locate their operations in the United States. They are not required to set up shop in union states or right-to-work states. Businesses choose to locate wherever it makes the most business sense. The decision to open a new manufacturing facility is not as simple as whether or not there is a strong union presence in a state or whether it is a right-to-work state. These decisions are reached after the careful consideration of a wide array of factors ranging from the economic climate of a state to its access to ports.

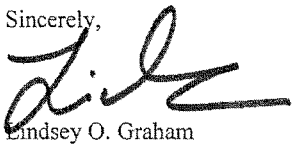
Let's be clear. If the NLRB is allowed to overrule Boeing's business decision there are no winners. Washington does not win, the unions do not win, nobody wins. The repercussions of this case will ensure that businesses will simply decide to move operations overseas. South Carolina has seen what happens when businesses find better opportunities overseas -- the jobs leave and they don't come back.

The NLRB action is especially astounding when you consider that President Obama's own White House Chief-of-Staff, William Daley, was on Boeing's Board of Directors when they made the decision to open the second assembly line in South Carolina. The CEO and President of Boeing, Jim McEnery, also serves as the Chair of President Obama's Export Council. President Obama recently nominated John Bryson, the longest serving Director on Boeing's Board of Directors, as the Secretary for the Department of Commerce.

President Obama would not have these men in high-profile administration positions if he believed -- like the NRLB alleges -- that they had engaged in union-busting. I have and will continue to strongly encourage the President to speak out about Boeing and the fact that these are ethical individuals serving his Administration.

Unfortunately, the NLRB's agenda is much different than ours. They are seemingly determined to drive American companies and American jobs overseas. I can't think of a better way to continue promoting policies which lead to high unemployment and future job losses than to allow this misguided complaint by the NLRB to go forward.

Sincerely,



Lindsey O. Graham
United States Senator

Senator Jim DeMint (R-SC)

Statement for the Record

House Committee on Oversight and Government Reform

Hearing on "Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise"

June 17, 2011

Thank you, Mr. Chairman, for holding this hearing today in Charleston. The NLRB's unprecedented action against The Boeing Company is not only vitally important to South Carolina, but to businesses and workers in every state across America.

As an arm of the federal government, the NLRB has an obligation to not only protect union workers, but non-union workers as well. Americans must have the ability to choose whether to join a union or not join a union as a condition of employment. 22 states given employees that choice and the federal government must respect that. Companies also deserve the right to build and expand their businesses where they will have the best chance of economic success. Otherwise, there can be no such thing as free enterprise in this country.

This is why it is so shocking that the NLRB is pursuing a complaint against The Boeing Company for its decision to expand to South Carolina to build Dreamliner airplanes, a move that could create up to 3,800 new jobs in Charleston and allow them to export more of their high-quality American product.

Boeing is an American company creating American jobs. The government has no business dictating where it can build, or who it should employ. If the NLRB continues down this course, thriving American companies will have no choice but to go overseas, depriving Americans of future job opportunities. The government cannot be for jobs if it is actively working against job creators.

Boeing's expansion should be celebrated, not the subject of a federal complaint. These new jobs in Charleston do not come at the expense of those at the first Dreamliner plant in Everett, Washington. In fact, the Everett factory has added more than 2,000 jobs since Boeing announced it would build the Charleston plant. But, because South Carolina is a right to work state, which does not force employees to join a union as a condition of employment, and Washington is a forced unionism state, which does, the NLRB is turning a commonsense business decision into a federal matter.

Acting on behalf of the International Machinists Union and Aerospace Workers, the NLRB's General Counsel has made the baffling determination that what Boeing did is "illegal." In reaching this conclusion, the taxpayer-funded NLRB spent a significant amount of time listening to the complaints of union members who have not lost their jobs and are not at risk of losing

their jobs. The NLRB has not given that same consideration to non-union workers in Charleston, who will lose their jobs if the NLRB is successful.

Three of Charleston's Boeing workers filed a request to participate in the lawsuit to make their concerns about job security heard. The NLRB lawyers denied their request, saying "their unnecessary participation…would merely delay and complicate these already complex proceedings."

This denial stands in clear contrast of the NLRB's mission to protect employees' rights to act together, with or without a union, to improve working terms and conditions.

The federal government cannot treat non-union jobs as if they are less important than union jobs. All employees must have equal rights under the law and afforded the same protections by their government. The NLRB is not maintaining that balance.

I thank the U.S. House for taking its oversight duties seriously by holding this hearing to discuss the NLRB's case against Boeing. Congress must have a role in making sure the NLRB is staying true to its mission.

Unfortunately, the U.S. Senate has not been given the opportunity to exercise its constitutional duty of "advice and consent" when it comes to political appointments made to the NLRB.

The NLRB's Acting General Counsel, Lafe Solomon, was appointed to serve a full four-year term on January 2011. The Senate still has not been able to vet him. Mr. Solomon has not appeared for a Senate confirmation hearing, nor has he been subjected to a full Senate confirmation vote.

Craig Becker, a former lawyer for the Service Employees International Union and AFL-CIO, was given a recess appointment to become one of the five members of the NLRB's powerful board over widespread, bipartisan objections in the Senate to his nomination. In fact, the Senate rejected his nomination in February 2010. Yet, a month later, he was recess appointed by the President.

Today's hearing is necessary. I thank the Chairman again for his diligence and attention to this matter and hope the witnesses provide the public with more clarity about where the NLRB's priorities lie and whether that is in the best interest of America's workforce, union and non-union alike.

Mr. GOWDY. Mr. Chairman, the purpose of the National Labor Relations Act is to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, and to protect the rights of the public in connection with labor disputes affecting commerce.

In other words, the NLRA is supposed to strike a proper balance between the rights of employees, employers, and the public. But you would never know that for the actions of the NLRB. Under the guise of enforcing the NLRA, the NLRB has essentially become a sycophant for labor unions.

At a time when union membership is at a historic low, the NLRB seeks to give unions a historically unprecedented level of influence. Exhibit A is the NLRB's recent interaction with the State of South Carolina.

Not only did the NLRB threaten to sue the State of South Carolina for seeking to memorialize in our constitution something as revolutionary as the right to a secret ballot, this administration—not content with class warfare, not content with generational warfare—now seeks to engage in regional warfare, pitting workers in Washington State against those who seek jobs in South Carolina.

Boeing has made airplanes in Washington for several decades. And during the course of that time, there have been at least four work stoppages which threatened Boeing's ability to deliver airplanes to customers in a timely fashion. So Boeing did what any responsible company would do. It looked to see where best to start a new, separate, distinct line of work on the 787 Dreamliner.

The union didn't like that, and they found a willing ally in the NLRB. The NLRB filed a complaint against Boeing. And lay aside the demonstrably false allegations of the complaint, lay aside the unprecedented legal analysis, the NLRB wants to make Boeing shut down its South Carolina facility, get rid of the 1,000 employees that have been hired, and return the work to Washington State.

The spokesperson for the NLRB is quoted as saying this. "We are not telling Boeing they can't build planes in South Carolina. We are talking about one specific plane, three planes a month. If they keep those planes, those three planes a month in Washington State, there is no problem."

Let that sink in for a second. An unelected executive branch entity spokesperson is telling a private company what it can make, where it can make it, and how much of it it can make. According to the reasoning of the NLRB, it is fine for a new company to consider wage rates, work stoppages, and take the full panoply of factors into consideration in deciding whether to pick a union State or a right-to-work State. But a company who has already planted a flag in a union State cannot dare consider starting a new line of work in a right-to-work State.

And make no mistake, this is a new line of work. Not one single employee has lost a job in Washington State. Not one single employee has suffered an adverse consequence as a result of Boeing's decision to start a separate, distinct line of work in South Carolina.

Despite congressional intent and clear Supreme Court jurisprudence, union leadership and unelected NLRB attorneys are now seeking to become managing partners in the business affairs of

American companies. South Carolina is confident Boeing will be vindicated in a court of law. However, the NLRB's jurisdictional overreach, coupled with its brazen activism, threatens the future allocation of work by American companies.

South Carolinians want to work, Mr. Chairman. We need the jobs. We want to meet our familial and societal obligations.

Thank you, Mr. Chairman.

Chairman ISSA. I thank you.

We now recognize the gentlelady from the District of Columbia, Ms. Norton, for her opening statement.

Ms. NORTON. Thank you very much, Mr. Chairman.

I wish I could say to my good friend, the chairman, that I am pleased that he has called today's hearing.

Chairman ISSA. I am pleased to have you here. [Laughter.]

Ms. NORTON. But, Mr. Chairman, today's hearing makes unfortunate history with an unprecedented appearance of an abuse of the rule of law and constitutional due process. Congress has obligatory oversight responsibilities over the National Labor Relations Board and the National Labor Relations Act. But when it threatens to issue a compulsory subpoena of decisionmaking counsel in the middle of a legal proceeding, it lends an appearance of intimidation.

Among other subjects, I have taught labor law as a tenured professor of law at Georgetown University Law School and know of the difficulty and close calls of these fact-laden cases and of the pains Congress took to create an independent general counsel and an independent board to avoid the appearance of seeking to influence the outcome of a legal proceeding while it is in progress and before any decision on the merits has been made.

How else to interpret actions by Members of the House and Senate, including threatening subpoenas, demanding the privileged work product of counsel, and threatening to defund the essential court here, the National Labor Relations Board, before it has made a decision or even heard the case.

I may be a Member of Congress, but I am still a member in good standing of the bar and an officer of the court. I have no basis for a judgment on the merits of the ongoing proceeding in my role as a Member of Congress, and I will not use this hearing to try to influence the outcome.

I hope that following this hearing, this committee may once again embrace the long tradition of Republican and Democratic chairmen alike to avoid the possibility of appearing to taint a legal proceeding by engaging in a hearing while the proceeding is ongoing.

And thank you, Mr. Chairman.

Chairman ISSA. I thank the gentlelady.

We now recognize the gentleman from Texas, Mr. Farenthold, for his opening statement.

Mr. FARENTHOLD. Thank you, Mr. Chairman.

It is good to be in South Carolina. I am here as a member of the Government Oversight and Reform Committee and also as a concerned Texan, a State that, like South Carolina, has worked hard to create a business-friendly environment with low taxes, reasonable regulations, and a great work force and a great place to live.

Governor Perry and the legislature in the State of Texas have worked hard to create much the same environment, and these issues that affect South Carolina affect a whole lot of other States as well. In fact, the State of Texas Attorney General Abbott, along with 16 other attorney generals, have filed an amicus brief in this proceeding.

And we have States like Alabama, Arizona, Florida, Georgia, Idaho, Kansas, Nebraska, Oklahoma, South Dakota, Utah, Virginia, and Wyoming. And they were also joined by non right-to-work States like Colorado and Michigan. I think this is a telling feature because this decision could have huge potential impact on economic development.

In right-to-work States, it would create an environment where companies are afraid to create new lines of business and expand into those States. And in States that are non right-to-work States, it creates the impression that, well, we don't want to startup in those States because as we grow, we are stuck in those kind of States. And that is absolutely the wrong thing for the Federal Government to be doing, telling private businesses where they can and cannot locate, where they can and cannot grow their business.

We are in a climate right now in this Government where regulatory and quasi-regulatory agencies are out really trying to stop growth. I am deeply concerned that there is a concerted effort on the part of this administration and its regulatory agencies to punish States that have different philosophies than they do, that believe in balanced budgets, that believe in lower taxes and believe businesses are the place to create jobs for people.

And this is a dangerous precedent that is being set, and that is one of the reasons we are here today. It is not trying to influence the outcome of something. It is trying to say it never should have been started in the first place.

Thank you very much, and I yield back.

Chairman ISSA. I thank the gentleman.

We now recognize the gentleman from Cleveland, Ohio, Mr. Kucinich, for his opening statement.

Mr. KUCINICH. Thank you very much, Mr. Chairman.

I want to associate myself with the remarks of Eleanor Holmes Norton with respect to this procedure. I trust the chair will take into account our concerns and will conduct himself accordingly.

But I am concerned that the workers' rights, which the NLRB decided have been violated by Boeing, would be further violated through any infringement on right to due process, equal protection of the law, right to fair trial through these proceedings. But again, that is in the hands of the chair.

The question that faces us at its core—did Boeing unlawfully retaliate against its Washington State workers, who were lawfully exercising their right to strike? Boeing's executive vice president Jim Albaugh told the Seattle Times, when speaking of a move, "The overriding factor was not the business climate, and it was not the wages we are paying people today. It was that we can't afford to have a work stoppage every 3 years."

Boeing planned to transfer jobs away from Washington State and a unionized work force in the Seattle area to a nonunion facility in South Carolina. The National Labor Relations Board found that

Boeing violated the National Labor Relations Act when it made coercive statements and it threatened its employees for engaging in legally protected activity, strikes, and for transferring work from the same work force in order to avoid the possibility of those workers engaging in protected activity in the future.

There are 3,300 people currently working on the 787 Dreamliner in Everett. This operation is supposed to scale down as the South Carolina plant is fully operational. But the scaling down is, in effect, a transfer of work, which has been correctly identified as retaliatory in violation of the National Labor Relations Act.

I would say that it is not the NLRB, but it is Boeing that has pitted one State against the other. It is Boeing that is pitting one group of workers against another at a time of great economic uncertainty and at a time when corporate profits generally are rising during a jobless recovery.

I want to say, Mr. Chairman, I respect my colleagues on the other side of the aisle who are here fighting for their constituents. I respect that. That is what you are supposed to do.

But we have a deeper question here, and that is did Boeing violate the law? And if it did, are there remedies available to the workers under that law?

And if the answer comes to be that it did, then the remedies that are put to Boeing, it would be unfortunate if the people in South Carolina would have to suffer. But Boeing is going to have to have that on their account because this is something that really relates to what the law is.

And finally, Mr. Chairman, Boeing—I think we ought to be concerned about keeping jobs in this country. And it is inevitable that Boeing is going to have to consider calling work back from overseas when they outsource it and increase the production curve and the delivery curve of their Dreamliner. So we want the work to come back, and we want to make sure that workers everywhere have a chance to participate in a renewed American manufacturing climate.

Thank you, Mr. Chairman.

Chairman ISSA. I thank the gentleman.

Pursuant to our rules, we will next go to Mr. Braley, as a member of the committee.

Mr. BRALEY. Thank you, Mr. Chairman.

I would like you all to look at the seal behind the chairman because it has what the people of the County of Charleston felt were important principles to promote when they formed this government. And you will see up there "pro bono public"—"for the public good."

And unfortunately, this hearing misses the point that the purpose of a National Labor Relations Board investigation is to determine what is in the public good when the NLRB exercises its constitutional responsibility to investigate whether labor laws have been violated, in this case by Boeing, and, if so, what a proper remedy for those violations should be.

And if you remember only one thing, you need to think about not just what due process means to the parties to this complaint, but what it means to you and your families and your friends and your neighbors. Because this goes much deeper than an NLRB hearing,

and the problem with this hearing is it involves an unprecedented improper interference by Congress with a pending adjudicative proceeding as defined by the Federal statute and based on years of precedent.

So what we should be talking about is not what the person who is in charge of prosecuting that case is doing, but whether, in fact, Boeing broke the law and what should be an appropriate remedy.

One of the things that you learn in your first days of class in administrative law is that administrative agencies act in one of two ways. One is by rulemaking, where there is an opportunity for expansive public input and congressional input, and all of us engage in that on a constant basis.

But the other type of action by agencies is called adjudication, and it is just like a judicial proceeding. And just as you aren't supposed to tamper with juries who are deciding the facts in a case in a court, you aren't supposed to tamper with witnesses who appear in front of that court, even though they aren't involved in the process of deciding the outcome of that case.

So what we should be talking about is things that are the basis of our Constitution and how this country was founded. Let me read this to you.

"He has obstructed the administration of justice by refusing his assent to laws for establishing judicial powers. He has made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries."

That is in our Declaration of Independence because our Founding Fathers didn't want people interfering with judicial processes, which is what was happening in England. And that is why, when we are talking and the chairman mentions the threat to reindustrialization of the American work force, folks, we are involved in the race to the bottom right now.

We had 397,000 factories in this country at the beginning of the last decade. We only have 343,000 now. That is a closure of 54,000 factories, a loss of 5 million jobs. That means every day 15 factories are shutting down. That is what we should be talking about today.

Chairman ISSA. I thank the gentleman.

We now go to another favored son here, Mr. Joe Wilson.

Mr. JOE WILSON. Thank you, Mr. Chairman. And thank you for holding this North Charleston hearing.

Indeed, this is unprecedented. What we are talking about is an unprecedented expansion of big Government determining where companies can locate their operations and employ citizens. But more importantly, right here, what we have is an assault on Boeing which kills jobs in South Carolina.

And this is an issue very important, obviously, to the families of South Carolina, but it is important to all the people of the United States. I am really grateful to be here in that this is my birthplace—Charleston, America's historic city. I am very grateful that the people who will be working with Boeing are going to be working in a world-class community. That is why they have come here.

And to be here with Congressman Tim Scott, who is the resident Member of Congress. We have our workhorse former Member of Congress, Henry Brown. Speaker of the House Bobby Harrell is

here. The leadership of this community has just been so proactive, creating jobs.

Charleston is such a fitting location for this hearing, Mr. Chairman, in that this is the home of Governor Jim Edwards. It was his leadership that recruited Michelin to South Carolina. We now have the North American headquarters in Greenville here in South Carolina. We have seven plants across South Carolina.

In fact, in the district I represent in Lexington, over $1 billion has been invested since 1979, creating thousands of jobs. So we have a record of recruiting industry.

And of course, to be here at the Port of Charleston, this is a tribute to former Governor Carroll Campbell. He recruited BMW. And right here from Charleston, over 1 million BMWs have been exported around the world. And so, it is a real tribute.

The reason that people and companies locate in South Carolina is that we have a capable, productive work force. We have a world-class technical college system. We have a welcoming climate. It is a meteorological climate that is mild. You can do business year round, and the people are warm.

We are a right-to-work State that protects the rights of workers. And we have pro-business leadership in government with Speaker Harrell, with the senate president Glen McConnell, Democrats, Republicans working together, supportive of this expansion of Boeing to South Carolina.

We welcome this, and I look forward to the testimony today. But the people of South Carolina are so supportive of creating jobs and creating opportunity for the families of South Carolina.

Thank you.

Chairman ISSA. Mr. Scott, we now ask you to top all of those openings. [Laughter.]

Since this is your town. You are recognized.

Mr. SCOTT. Thank you, sir.

I would like to start off by simply saying thank God for South Carolina, the home of common sense and the permanent home of the Boeing Corp., number one.

Number two, it is obvious that the campaign season has begun. There is no question that we are in the process of seeing the beginning of a Presidential reelection campaign, as we find ways to fill the coffers in an attempt to use union workers and their dues as a way to create a winning combination for a Presidential campaign.

Number three, on the issue of politics of intimidation, think of this, if you will. America's greatest exporter being brought to task not for the elimination of a single union job in Washington State, but for the addition, the increase, the creation of jobs, 1,000 jobs in South Carolina.

Think of this for just a minute. The definition of intimidation is having the NLRB require the Boeing Corp. to spend hundreds of thousands, if not millions, of dollars defending a baseless lawsuit, a baseless complaint.

Imagine, if you will, the workers in Washington State as they see 2,000 new employees since the announcement of the North Charleston plant, 2,000 new employees show up for work. That does not sound like retaliation.

Think, if you will, that here in Charleston, North Charleston, we have had a $1 billion investment by the Boeing Corp., and now—and now we find ourselves having a complaint to be issued to solve a problem that simply does not exist.

Why are we here today? How did we get here? In America's fragile recovery, during the midst of one of the most amazing recessions, at the verge of a double dip in the recession, we find ourselves telling the Boeing Corp. that they ought to figure out how to take these jobs to another country. Because make no mistake that the beginning of an interstate war, interstate war between Washington and South Carolina, between right-to-work States and union presence States, we find ourselves having a really important conversation.

And the conversation is not about right-to-work versus not the right-to-work. It is not about Washington State or South Carolina, as it has been teed up. It is truly about whether or not we want American corporations doing business in America, or—or do we want to send more jobs to China?

Do we, in fact, want the laws of our country to dictate the success of America's greatest corporations, or do we want other nations to decide and to determine the work force of America? This entire process is baseless. We find ourselves in the midst of a hearing that should not be. I do agree with that.

Because if there was something warranted in this process, we should have addressed it. But simply said, this is a baseless complaint. We find ourselves in the midst of the campaign season. Using your tax dollars, using your tax dollars in an unprecedented way, to tell private companies where and how to create jobs.

It is interesting that the seven planes that they are producing in Washington State, none of those jobs are moving. Those seven planes will be coming out. They have decided that they want an additional three planes a month. They looked far and wide, and they decided that the greatest work force in all of America here in North Charleston would be the place to have it.

Thank you.

Chairman ISSA. I thank the gentleman. Albeit a little long, you did top everyone else. [Laughter.]

I would now ask unanimous consent that the statements of Meredith Going Sr. and Dennis Murray II of the South Carolinian-based Boeing employees, who sought to intervene in this case involving Boeing Co., the International Association of Machinists, and the NLRB, be entered into the record.

Without objection, so ordered.

[The information referred to follows:]

Statement for the Record

My name is Meredith Going, Sr. I am one of the South Carolina-based Boeing employees seeking to intervene in the case involving the Boeing Company, the International Association of Machinists and the NLRB regarding Boeing's South Carolina operations.

I reside in North Charleston, SC, and I am currently employed by Boeing in North Charleston, SC.

I am 65 years old. I was born in Charleston, SC, and I have lived in this area for virtually my entire life. I have lived in the same house for 26 years.

I previously worked for Lockheed-Georgia ("Lockheed") in Charleston, SC from Sept. 1965 until sometime in 1970. When I went to work at Lockheed there was no union. I helped organize for the Machinists union ("IAM"), and the employees voted in the union. Once the union was voted in, I was a voluntary member of the IAM.

I left the aerospace field for many years, but then was hired by Boeing to work at its North Charleston aircraft assembly operations on July 16, 2010.

At this time I am happily working for Boeing in a nonunion setting. I feel that Boeing realizes the value of well-trained employees who are happy with their pay and benefits, and realizes that in order to keep people satisfied with their employment here in Charleston they are going to have to pay employees commensurate with their level of experience. Boeing is treating employees well, and the wages, wage structure and benefits are competitive. Most employees in my building are very happy to be working for Boeing, and I know many people who would like to work here if they could.

When I was hired, I was trained through the State of South Carolina technical training program, as part of an agreement that the State has with Boeing to entice them to come here. I went through a rigorous screening and hiring program, then I was assigned to the training program. Once I completed 8 weeks of training, I was given an assignment in the plant based on what Boeing needed to be done at that time. I am currently working in the mid-body plant, where we join the barrel sections of the aircraft. This is where the "join" is initially done on three main sections of the aircraft. We do the "drilling and filling" work, and then the different systems (e.g., hydraulics, passenger components, etc.) are added farther down the production line. My building never had a union in it, and it was not part of the decertification of the IAM that occurred in another building in 2009.

Although I am now working in the mid-body plant, I am assigned to the new final assembly and delivery ("FAD") part of the operation. Once production begins there in approximately June or July, 2011, I expect to move to that part of the operation. Boeing is trying to get experienced people to work at FAD. They are picking people to be pulled from the other departments to go into FAD based on their prior work experience. They have probably taken about a hundred people so far for FAD, who are already working at Boeing in Buildings 88-19 or 88-20.

I understand that the NLRB General Counsel seeks a remedy in this case that would force Boeing to discontinue the FAD work in Charleston, and transfer it to Seattle. This remedy is grossly unfair and would devastate our community and my family.

It seems clear that many Charleston-based employees and I would lose our jobs with Boeing in South Carolina if the General Counsel's proposed remedy is adopted. The current unemployment rate here is high and jobs are scarce. Many people I know would like to work at Boeing if they could. I am 65 years old, and was unemployed for over a year before I got this job with Boeing. Before coming to Boeing, I was laid off from my previous job in the automobile finance business. If I lose my job with Boeing, I'd have to go back on unemployment. Because of the economic downturn I was already forced to draw social security earlier than I would have liked. My wife is also drawing social security disability, and is older than me and cannot work. I am sure that any unemployment I would receive would run out quickly, and at my age getting a good job with good wages and benefits like what I have here with Boeing is extremely difficult. Many other families in this area face similar economic hardships.

Even if Boeing gave me the opportunity to move to Washington to perform the work that the General Counsel seeks to transfer to that state, I would oppose and decline such a move because I have lived here all my life and I have been in my current house for over 26 years. In fact, because of my layoff and economic situation I had to take out a reverse mortgage on my house, and would lose my house if I had to move out and relocate to Washington. There, I would be forced to rent or lease adding to the economic difficulties my wife and I would face.

Moreover, I would not want to work in such a unionized environment where compulsory union dues are required, nor do I believe that I should have to in order to earn

a living and feed my family. Having once helped organize an IAM union, I have seen what happens in a unionized environment, and I would not want to work in such a place, where the union treats everything as an adversarial relationship with the employer. When I helped organize the union at Lockheed earlier in my career, I was young and naive about unions, but I am neither young or naive any longer. There are people who are currently organizing for the IAM here in Charleston, but I want nothing to do with another chapter of the IAM or any other union.

I have chosen to exercise my rights as a citizen of the United States to live and work in South Carolina. I have chosen to exercise the rights provided to me under the state and federal laws that prohibit compulsory unionism. I believe that employees should be allowed to refrain from joining or supporting any labor union. I have nothing against unions in general, but I do not believe that they should be compulsory. I do not believe that employers should be told by the federal government where they can establish their operations.

I declare under penalty of perjury that the foregoing is true and correct

Meredith Going, Sr.

Statement for the Record

My name is Dennis Murray. I am one of the South Carolina-based Boeing employees seeking to intervene in the case involving the Boeing Company, the International Association of Machinists and the NLRB regarding Boeing's South Carolina operations.

I reside in Summerville, SC. I am currently employed by Boeing in North Charleston, SC.

Along with my family, I have lived in South Carolina since 1981. I moved to South Carolina in 1981 when it was made my Air Force permanent duty station. I served in the Air Force for a total 8 years, and was honorably discharged in 1984.

I went to work for Lockheed in 1984 in Charleston, SC. I was employed within a bargaining unit represented by the International Association of Machinists & Aerospace Workers ("IAM"). I was a voluntary member of the IAM for most of the time I worked there.

Eventually Lockheed ran out of contracts and I was laid off. Later, Lockheed merged with Martin-Marietta, and the jobs in Charleston were moved to the Baltimore, MD area. I remained in Charleston and did not relocate to Baltimore.

I then worked for Bayer for about nine years, in the greater Charleston area. There was no union in that facility. I got laid off by Bayer when they downsized and sold off the facility, and I moved on to other jobs.

In 2008, I became employed by Vought, a manufacturer with a Charleston facility

that assembled two aft sections of large Boeing aircraft. In approximately July, 2009, Boeing bought the Vought facility where I worked, and I have been a Boeing employee since that time.

When I went to work at Vought in 2008, the IAM had been voted in as the employees' exclusive bargaining representative, but they were just negotiating a first contract. In November 2008, an IAM representative called an emergency meeting but only told twelve of the 200 union members in the unit about the meeting. A total of thirteen employees attended the meeting and those few in attendance ratified the IAM's contract by vote of 12-1. Many of the provisions of the new IAM contract were worse than what Vought employees already had without a contract. For example, employees lost medical, dental, and short term disability. The Vought employees were then extremely unhappy with the IAM's actions. This unhappiness was exacerbated by subsequent layoffs that lasted from three weeks to five months. Employees contacted IAM leaders to seek redress for the way that the contract had been ratified, but the IAM leadership turned down our requests to intervene and refused to assist us. I also contacted the NLRB and was told that this was not an unfair labor practice because the NLRB does not police internal union ratification votes.

Employees then collected more than 30% of signatures to decertify the IAM, but were told by the NLRB that we could not decertify until the contract expired, and we would have to wait until a 60-90 day period prior to the expiration of the contract.

In May 2009, we heard rumors that Boeing was going to buy out the facility from

Vought, and we started collecting new decertification signatures. On July 30, 2009 when it was formally announced that we were no longer employees of Vought but were now employed by Boeing, we filed a decertification petition with the NLRB. The case was docketed as *The Boeing Company/IAM*, NLRB Case No. 11-RD-723. I was the named decertification petitioner in that case. After Boeing bought Vought's facility, it continued to recognize the union as our representative, but employees wanted to get out of the union nevertheless. Boeing was not hostile to the IAM in any way and did not encourage us to decertify. We filed the decertification petition entirely on our own.

Besides our lack of support for the IAM, it soon became clear to many employees that there was another good reason to decertify the union. In 2009, during all of this maelstrom and the decertification campaign, the media was reporting that Boeing was in the middle of a site election process to decide where it should create a new final assembly and delivery line for the production of large aircraft. It was reported that Boeing was looking at several sites all over the country, including Charleston. Many employees knew about Boeing's site selection process, and discussed the fact that a decertification of the IAM would make our facility in Charleston all the more attractive to Boeing, since it was common knowledge that the IAM had caused major labor problems for the company in Seattle.

Thus, many employees who wanted to decertify the IAM because of the contract ratification fiasco also realized that our facility in Charleston would be in a much better competitive position to attract the Boeing final assembly and delivery work if we were

operating non-union, without the IAM's rules and labor strife. The decertification election was held on September 10, 2009, and the IAM was voted out by a tally of 199-69. Boeing announced that Charleston was selected as the site for the new final assembly and delivery site about two months later.

Now that we are working in a nonunion setting, I feel that Boeing is treating employees well. Within a few weeks after the decertification was final, Boeing gave us 3% across-the-board raises. Overall, the wages, wage structure and benefits are better under the current non-union Boeing than under the prior unionized Vought. Most employees in my building are happy.

The Boeing Campus in North Charleston, SC is divided into three production buildings. The former Vought facility is now identified as Building 88-19. It is the Aft-Body Manufacturing building where Sections 47 and 48 are made. Here the two sections are made from scratch, and then completed by the addition of all structural members and systems components. The sections are then joined together, making the rear third of the aircraft. Next is the former Global Facility, now known as Building 88-20. This is Mid-Body Assembly Facility where the mid-body sections are flown in from Italy and mated with the center wing section brought in from Japan. Once all the sections are joined and mated with the center wing section, the remainder of the systems components and wiring are installed completing the center third of the aircraft.

Last , there is the Final Assembly and Delivery Building, also known as FA&D. This is where the forward third of the aircraft is brought in from Spirit Aircraft in Kansas, the

Mid-Body brought in from Building 88-20, the Aft-Body section from Building 88-19 as well as the wings from Japan and Horizontal stabilizer from Italy. All the sections are then combined to create a complete 787 Dreamliner aircraft. The interiors will come from the IRC facility being completed a few miles away, and also be installed at FA&D. After a quick flight for a high quality customer paint job, the aircraft return to the Charleston delivery center where the customers will take possession of their new airliner.

Building 88-19 is currently staffed by about 1200 employees. Building 88-20 is currently staffed by about the same amount. FA&D currently has somewhere in the range of 800 to 1000 employees with 10 classes going around the clock with several hundred more employees preparing to work in the FA&D building. When it is fully staffed, FA&D will employee some 3800 employees.

Although I still work in the "old" section of the building working on the aft sections of the aircraft, it is possible that I could transfer over to the new facility.

I understand that the NLRB General Counsel seeks a remedy in this case that would force Boeing to discontinue the final assembly and delivery work in Charleston, and transfer it to Seattle. This remedy is grossly unfair and would devastate our community and my family. As noted above, I have been laid off several times in my career due to corporate re-structuring or lack of work, and it is a devastating experience.

It seems clear that many Charleston-based employees and I would lose our jobs with Boeing in South Carolina if the General Counsel's proposed remedy is adopted. The current unemployment rate here is high and jobs are scarce. If I lose my job, my

family will be devastated, as my son and daughter are both looking for work but are currently unemployed due to the high unemployment rate in this geographic area. Thanks to Boeing I am able to keep food on the table and a roof over my head for all of my family, including my grandchildren too. Many other families around here are in a similar boat.

Moreover, even if Boeing gave me the opportunity to move to Washington to perform the work that the General Counsel seeks to transfer to that state, I would oppose and decline such a move because I have already gone head-to-head with the IAM union and do not want to work in a unionized IAM environment in Washington, especially in light of what they have done to us here in Charleston.

In January 2009 Vought sent me to Boeing's Everett, Washington facility for training purposes. When I told those rank and file IAM members how we had been mistreated by the IAM, the rank and file workers voiced support for us. But of course the union officials were against our efforts to re-do the contract ratification and our efforts to decertify the IAM. One union official went on the public record and said that he would try to keep work from coming to our plant in Charleston because of the decertification. I would not want to work in such a hostile unionized environment, nor do I believe that I should have to in order to earn a living and feed my family.

I have chosen to exercise my rights as a citizen of the United States to live and work in South Carolina. I have chosen to exercise the rights provided to me under the state and federal laws that prohibit compulsory unionism, and allow employees to refrain

from joining or supporting any labor union. I served in the military to uphold every citizen's basic constitutional rights, which includes the right not to be compelled to join or support any private organization. Moreover, along with a large majority of my co-workers, I have already chosen to exercise my rights under the NLRA to decertify the IAM when it was our representative at the same facility. I have nothing against unions, but I do not think they should be compulsory. I do not think employers should be told by the federal government where they can establish their operations.

I declare under penalty of perjury that the foregoing is true and correct.

_____

Dennis Murray

Chairman ISSA. I will now introduce our panel of witnesses. Oh, additionally, I would ask unanimous consent that all Members, both present and those who may join us, would have 7 business days in order to put additional statements and extraneous material into the record.

Without objection, so ordered.

We now recognize our first panel of witnesses.

Mrs. MALONEY. Mr. Chairman.

Chairman ISSA. Would you let me get them through before any points of order? I won't start without it.

Mrs. MALONEY. Thank you.

Chairman ISSA. Mr. Philip Miscimarra is a partner at Morgan, Lewis & Bockius?

Mr. MISCIMARRA. Bockius.

Chairman ISSA. Bockius LLP. And you specialize in labor and employment practices in Chicago, Illinois.

Mr. Neil Whitman is president of Dunhill Staffing Systems in Charleston, SC, specializing in staffing.

Mr. JULIUS G. Getman is the regent chair at the University of Texas at Austin School of Law.

Ms. Cynthia Ramaker is an employee of the Boeing Co. in North Charleston but is testifying today as an individual and not on behalf of the company.

And Mr. Lafe Solomon is the acting general counsel of the National Labor Relations Board.

And I didn't miss anyone. So before we have anything else, pursuant to the rules, I would ask all witnesses to rise to take the oath.

Raise your right hands.

[Witnesses sworn.]

Chairman ISSA. Let the record reflect that all answered in the affirmative. Please have a seat.

Does the gentlelady have a point of order?

Mrs. MALONEY. Yes, Mr. Chairman.

Chairman ISSA. Please state your point of order.

Mrs. MALONEY. I do have a parliamentary inquiry.

Chairman ISSA. Please state your inquiry.

Mrs. MALONEY. And I would like to articulate a concern that I expressed in my opening statement as to Ms. Norton and Mr. Kucinich about the potential damage this hearing could have on the National Labor Relations Board action against Boeing, which is currently being heard by a judge as we sit here today.

My concern echoed a letter that the ranking member of the Oversight Committee, Mr. Cummings, and the ranking member of the Committee on Education and the Workforce, Mr. Miller, sent you yesterday. And I would like unanimous consent to place it in the record.

Chairman ISSA. It will be placed in the record. I have a copy.

[The information referred to follows:]

Congress of the United States
Washington, DC 20515

June 16, 2011

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

As the Ranking Members of the two House Committees with oversight and legislative jurisdiction over the National Labor Relations Board (NLRB), we write to express our grave concerns about the June 17, 2011, field hearing you have scheduled in South Carolina regarding the NLRB complaint against The Boeing Company (Boeing). These concerns have been heightened by your latest letter to the NLRB's Acting General Counsel, Lafe Solomon, on June 14, 2011.

The timing of the hearing, your insistence on Mr. Solomon's personal appearance, and the nature of your June 14 letter indicate a serious potential for improper interference with a pending case involving private parties and a disturbing disregard for what that interference could mean for the due process rights of those parties.

Your letter also raises new questions about the intent of this hearing. The hearing ostensibly relates to the NLRB Acting General Counsel's case against Boeing. This case opened on Tuesday, June 14 before an Administrative Law Judge, just three days before your scheduled hearing. That timing does not appear to be coincidental. Although you could have held a hearing with any array of experts, you have insisted that the chief prosecutor of the case—the person with ultimate decision-making authority over all prosecutorial decisions in the case—testify at this hearing while the trial is underway. Those prosecutorial decisions do not end with the issuance of a complaint. Significant decisions will continue to be made until the prosecution rests. Yet, you have indicated that you plan to subject this decision-maker to questions about the active case at the hearing.

In the meantime, you have demanded internal deliberative documents from Mr. Solomon that could include, among other things, documents revealing the prosecution's trial strategy. Such information, if disclosed during the pendency of the case, would unfairly advantage the

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respondent, Boeing, and disadvantage the prosecution and the charging party. The intrusive nature of your demand for documents, as well as your approach to constitutional concerns in the June 14 letter, indicate that you have every intention at the upcoming hearing of pressing the very kinds of questions that put the due process rights of private parties in jeopardy.

After being invited to testify, Mr. Solomon expressed his serious reservations to you about his appearance and its potential impact on the due process rights of the parties to the case. You overruled those concerns and threatened to use compulsory means to force Mr. Solomon's appearance. Mr. Solomon attempted to accommodate your request by offering the testimony of another NLRB official who has no direct involvement in the pending Boeing case and provide his own written testimony. You rejected these offers.

Mr. Solomon's reservations are clear, and we share those reservations. Rather than entirely dismissing those reservations, you show ultimate disregard for them. In your June 14 letter, you stated:

> [W]hile I do not believe this Committee's oversight has any implications for the due process rights of the litigants, to the extent that it may, such a claim is for the affected parties to raise … in federal court after a decision has been rendered by the agency. ... [T]he time to bring such a claim [of Congressional intervention] is after a final agency decision is rendered. This is because a court's analysis will turn on whether the decision-maker was in fact influenced by Congress. As you know, the case is pending.

In other words, you seem to believe that, even if your conduct amounts to improper interference with constitutional rights, that should not be the Committee's concern and instead should be left to the parties to litigate later.

But it <u>is</u> the Committee's concern, and it is the concern of all Members of Congress that we conduct ourselves in a manner that upholds the Constitution. Recognizing the risk of interference, as well as the risk of the appearance of interference, a responsible chairman would take care to minimize these risks. Rather than creating a new basis for appealing any final agency decision, increasing uncertainty, and shifting the costs of your interference onto private parties, the Committee should wait until the case is no longer pending before calling the chief prosecutor to testify at a hearing about that case.

Oversight should, above all, be a tool for maintaining the integrity of government institutions, their processes, and Americans' constitutional rights. What you are calling oversight here is attempting to do just the opposite. At every turn, it threatens that integrity.

There is still an opportunity for you to demonstrate some modicum of concern about the constitutional and ethical impact of what you are doing. We strongly urge you to be circumspect about the nature of the questions you and other Members pose to the chief prosecutor of this live

case at the hearing. At a minimum, we ask that you direct Committee Members to limit all questions to Mr. Solomon to general questions about the NLRB and its processes, and not issues related to the ongoing proceeding before the Administrative Law Judge.

There is no dispute that Congress has the authority to conduct rigorous oversight of federal agencies, including the NLRB. But Congress must not abuse this authority. We are confident that the Committee's oversight responsibility can be fulfilled without compromising the integrity of NLRB proceedings or the due process rights of private parties.

Sincerely,

George Miller
Ranking Member
Education and Workforce Committee

Elijah E. Cummings
Ranking Member
Committee on Oversight & Government Reform

Congress of the United States
Washington, DC 20515

June 17, 2011

Honorable Darrell Issa
Chairman
House Committee on Oversight and
Government Reform
2157 Rayburn HOB
Washington, DC 20515

Honorable Elijah Cummings
Ranking Member
House Committee on Oversight and
Government Reform
2471 Rayburn HOB
Washington, DC 20515

Dear Mr. Chairman and Ranking Member:

We are writing with concern about efforts to use political means to influence the process being carried out by the National Labor Relations Board (NLRB) involving the Boeing Company and the International Association of Machinists. While we do not write to express an opinion about the proper outcome of the case, we feel strongly that this case should be determined based on the facts and the law – not on politics.

It is our understanding that the complaint filed by the general counsel of the NLRB followed months of extensive but unsuccessful attempts at reconciliation. The case is now proceeding through a well-established adjudicative process where the facts of the case and the application of the law to those facts will be determined by an Administrative Law Judge, the NLRB and possibly the federal courts.

We understand the role of the Committee on Oversight and Government Reform is to oversee the functions of the government. We encourage the Committee to exercise its authority to investigate and expose waste, fraud, and abuse in the Federal Government. That said, the Committee should not attempt to influence the NLRB process for political gains. The NLRB is an independent adjudicatory agency. If the NLRB were to consider political pressure or other extraneous factors in adjudicating this case, the impartial process by which this case is being handled and the validity of any final legal decision could be ultimately undermined.

We urge the Committee to do all it can to protect the independence of the NLRB

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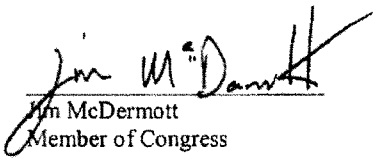
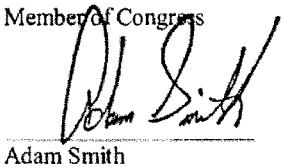
throughout this process.

Sincerely,

Rick Larsen
Member of Congress



Jim McDermott
Member of Congress



Adam Smith
Member of Congress

Chairman ISSA. I thank you for your inquiry.

Mrs. MALONEY. And I am hoping that you can inform us how you intend to proceed with the hearing today. Specifically, do you intend to protect the NLRB legal proceedings from political interference today by directing committee members to limit all questions to Mr. Solomon to general questions about the NLRB and its processes and not ask questions directly related to the NLRB proceedings?

Chairman ISSA. I will try to answer the gentlelady's questions, the ranking members' questions, the letters, coming both from the White House and multiple committees, and I will do it in the following fashion.

Mr. Solomon, I would like to ask you a few questions related specifically to your role here today to make clear what is in and not in bounds. Hopefully, we can do that on the record.

First of all, is it correct that you are here not pursuant to a subpoena but, in fact, voluntarily. After the subpoena was issued, there was an acquiescence of your being here. Is that roughly the truth?

Mr. SOLOMON. Sir, the subpoena was not issued.

Chairman ISSA. Oh, it was issued. It was signed. But our understanding is when the staff informed that a subpoena would compel, that there was an agreement outside of subpoena for your appearance voluntarily?

Mr. SOLOMON. I didn't know there was a signed subpoena. I—I——

Chairman ISSA. So, therefore, you are here voluntarily?

Mr. SOLOMON. I am here voluntarily.

Chairman ISSA. Okay. That is even better. So you are here voluntarily. Do you feel intimidated by us asking you questions related to decisions you have already made?

Mr. SOLOMON. I am here reluctantly. Not because I have anything to hide, but because I have a lot to protect. I need to protect the independence of the Office of General Counsel. I need to protect the due process rights of the litigants, and I need to ensure that there is a fair trial.

Chairman ISSA. Now you are not the administrative law judge?

Mr. SOLOMON. Correct.

Chairman ISSA. And you have already made your mind up in this case or you wouldn't have brought the case. Is that correct?

Mr. SOLOMON. I certainly issued the complaint. However, I am still actively involved in making strategic decisions about the litigation as it continues.

Chairman ISSA. It is our intent not to ask you as to your strategy of pursuit in this case against Boeing in which it is our belief—correct me if I am outright wrong—you have already made your decision they are guilty, or you wouldn't have brought this. Your strategy may change, but you made, you alone were the one person that made the decision to put this before an administrative law judge. And therefore, you had made a decision. Is that correct?

This isn't a fact-finding, go fishing. You have made a decision, and you are prosecuting a case?

Mr. SOLOMON. I made a decision that there was reasonable cause to believe that the National Labor Relations Act had been violated.

Chairman ISSA. Yes, if you could—I apologize. Perhaps because of the nature of these mikes, I think they are picking up okay, but if you would speak up just a little whenever possible.

Mr. SOLOMON. Certainly, sir.

I believed, after a thorough investigation, that there was reasonable cause to believe that the National Labor Relations Act had been violated. I authorized the issuance of a complaint. But you know, as I said, I am actively involved in going forward and determining the strategy of our litigation.

Chairman ISSA. Okay. And you are aware of precedent in which Congress has independently made decisions about all activities of the executive branch, whether direct or through a quasi-independent agency. Is that correct?

Mr. SOLOMON. Yes, sir. I am unaware of any time a general counsel of the National Labor Relations Board has been called before Congress in a pending litigation.

Chairman ISSA. You are aware that the Congress has, from time to time, convened, offered laws restraining even the Federal court and certainly the executive branch from certain actions which they disagreed with. Is that correct?

Mr. SOLOMON. I am no legal scholar in this regard——

Chairman ISSA. Fortunately, we have one here. I am sure he will pipe in at the appropriate time.

Okay. Then I will issue guidance pursuant to the gentlelady's request. We believe—the chair believes and will rule that questions related to that which you have already decided, but not related to the strategy you will pursue in the pending case are inbounds.

Facts which are entitled to be received by the defendant and others will be considered reasonable to ask for. Any item which is not discoverable by the defendant will be considered out of bounds for any question.

The clock will stop if at any time individuals on either side ask a question in which you wish to seek or believe you need to seek your counsel. Unless your counsel is sworn, he won't be able to answer for you, but he will be available to you, and you will have whatever time you want or whatever time you need.

Additionally, it is not our intent to interfere with the process ongoing. Congress has an independent right to make a decision to change the outcome.

We could eliminate the NLRB. We could choose to take your premise and statutorily change it. That is part of the consideration that Congress has to make, and we have to make it in real time. This is not something we can wait until 3 years from now. Plus, we have amicus possibilities at any appropriate time.

We will limit our questions to that decision which you have made and that which would be otherwise discoverable and nothing beyond that. Is that understood, and do you agree?

Mr. SOLOMON. Yes. I think we might need to play it out a bit before I understand it.

Chairman ISSA. They give me a gavel so that I can make additional statements and rulings as appropriate.

Is the gentlelady satisfied that at least to begin——

Mrs. MALONEY. I would like to thank the chairman. Congress historically has treaded very carefully before choosing to interfere

in the legitimate law enforcement activities, and the timing of this hearing is unfortunate in that the proceedings have started. And I am confident that the committee's oversight responsibility can be fulfilled today without compromising the integrity of the NLRB's proceedings or the due process rights of private parties.

So thank you for clarifying that, and let's go forward.

Chairman ISSA. I think we have gotten to the starting point. And again, we will pause the clock if you need to consult on any question, and I will consider changes as necessary.

With that, I am wrung out from asking questions. So before I take my round—I already did that. I did that. I am going to say that. Okay. We will now begin, and we will go right down the row with opening statements.

Unlike us, where we hopefully suspended a little bit of what otherwise would have been the long opening statements, you will have up to a full 5 minutes. When you see, if you can see the lights go from green to yellow to red, please try to wrap it up.

Understand your entire opening statement, no matter how long, will be included in the record of this hearing, in addition to extraneous material or additional comments you may choose to add later.

With that, Ms. Ramaker.

Ms. RAMAKER. Oh, wow.

Chairman ISSA. If you would like to pass, we will come back to you.

Ms. RAMAKER. No, I'm fine.

Chairman ISSA. Thank you very much for being here. I realize that you are not accustomed to this kind of procedure, and we didn't help with our opening start. But please understand we know you are here as an individual and just be comfortable and say what you feel from your heart.

STATEMENTS OF CYNTHIA RAMAKER, EMPLOYEE, THE BOEING CO.; NEIL WHITMAN, PRESIDENT, DUNHILL STAFFING SYSTEMS; LAFE SOLOMON, ACTING GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD; PHILIP MISCIMARRA, LABOR ATTORNEY, MORGAN, LEWIS & BOCKIUS LLP; AND JULIUS GETMAN, PROFESSOR, EARL E. SHEFFIELD REGENTS CHAIR, UNIVERSITY OF TEXAS SCHOOL OF LAW

STATEMENT OF CYNTHIA RAMAKER

Ms. RAMAKER. Okay, if you hear this noise, it's my knees knocking. So I'm sorry.

Chairman ISSA. Could you pull the microphone a little closer?

Ms. RAMAKER. All right. My name is Cynthia Ramaker. I'm an employee—my name is Cynthia Ramaker. I'm an employee of Boeing based in North Charleston, SC.

I am one of the employees who is attempting to intervene in the case involving the Boeing Co., the International Association of Machinists, and the NLRB regarding Boeing's South Carolina operation.

In April 2006, I was in the first group to be hired by Vought Aircraft, the manufacturer with the Charleston facility that assemble

the two aft sections of large Boeing aircraft. When I went to work for Vought in 2006, the IAM had not made contact with employees.

In 2007, IAM organizers began soliciting Vought employees with a door-to-door campaign. The union was eventually voted in in the spring of 2008, and after the union got in, it began contract negotiations with Vought. The IAM did not inform employees the importance of issues that were negotiated—being negotiated with Vought.

At some point, the IAM must have known the contract it was negotiating was likely to be rejected because the meeting in November 2008, at which the contract was to be ratified, was billed as a normal union meeting with no mention of a ratification vote. I recall the IAM assuring employees that any bad things in the contract would later be improved.

Of all the union members in the unit, only 13 attended the contract meeting—ratification meeting. Those few in attendance ratified the IAM's contract by a vote of 12 to 1. All of the provisions of the new IAM contract were worse than what we had as Vought employees. We lost medical, dental, short-term disability.

The Vought employees' dissatisfaction with the IAM's action surrounding the contract only increased when the workers were laid off in the following weeks. After the contract ratification, employees attempted to contact IAM officials, leadership. The IAM grand lodge representatives held one meeting, and then we had no contact from them for 4 months during the layoff. Nobody was even able to make contact with them.

Around this time, I was voted as the local president and continued in that position until September 2009, when the union was decertified. There was nothing I could do with respect to influencing the union leadership or reassuring the employees about our future under the new contract with the union.

I was not surprised by the unfair labor practice filed by the IAM in Seattle or Everett against Boeing. To me, they are violating my right to work with a choice. Isn't that what—my hands are shaking. Isn't that what being an American is all about, a choice? That's my right.

They made it perfectly clear to us that they did not want the 787 built here in South Carolina. After Boeing bought the facility, I was aware of a petition being organized to decertify the union, and I had no role in that signature gathering for the decertification petition. The decertification election was held in September 2009, and the IAM was voted out by a tally of 199 to 69.

Recently, the IAM has begun contacting employees again at their home, trying to get them to join. This campaign was very poor in comparison to the one several years ago.

The Boeing campus in North Charleston is divided into three different production buildings. Building 8819 is currently staffed by 1,200 employees. Building 8820 is currently staffed with about the same. When it is fully staffed, the FAD building—F, A, and D—will employ some 3,800 employees.

Thousands of people will be unemployed if the NLRB complaint is successful. Losing my job will be catastrophic to myself and the workers at the North Charleston Boeing facility. We are homeowners. We have families that will be affected.

And I understand that the NLRB general counsel's remedy in this case will force Boeing to discontinue the final assembly and delivery work in Charleston and transfer it to Seattle, and this would devastate—totally devastate our families and the community. It is absolute certainty that many Charleston-based employees, including me, will lose our jobs with Boeing in South Carolina if the general counsel's proposed remedy is adopted.

Boeing is one of the best employers in the area, and I would like to continue working for them. But if the 787 program is moved to Washington, I will not accept a relocation offer. I have chosen to exercise my rights as a citizen of the United States to live and work in South Carolina.

Our personal experience with IAM has been very bad. Although I have nothing against unions in principle, I strongly believe that membership in a union and representation by a union should not be compulsory.

We had a union in our plant. The majority of the employees did not want to be represented by that union. So it got voted out. Now it seems we are being punished for that choice.

I strongly believe that employers should not be told by the Federal Government or a union where they can establish their operations, and if Boeing thinks it can get the job done more profitably and successfully in South Carolina, then that's Boeing's decision to make.

And I declare under penalty of perjury that the foregoing is true and correct.

[The prepared statement of Ms. Ramaker follows:]

WRITTEN TESTIMONY

My name is Cynthia Ramaker. I am an employee of Boeing based in North Charleston, South Carolina. I am one of the employees who is attempting to intervene in the case involving the Boeing Company, the International Association of Machinists and the NLRB regarding Boeing's South Carolina operations. I reside in Ladson, SC. I have lived in South Carolina since 1975. My family also lives in South Carolina. I moved to South Carolina from New Jersey when my father was transferred by the Air Force. My statements here are true to the best of my knowledge and recollection of the facts and events surrounding the NLRB case.

Before working at Boeing, I was a police officer in Charleston County Police Department until 1989. I then worked for Daimler-Chrysler until about 2006. In April 2006 I was in the first in group to be hired by Vought Aircraft, a manufacturer with a Charleston facility that assembled two aft sections of large Boeing aircraft. I was a voluntary member of the IAM from the time the union first got in until it was decertified. I was a Vought employee until approximately July, 2009, when Boeing bought the Vought facility. Since then I have been a Boeing employee.

When I went to work at Vought in 2006, the IAM had not yet made any contact with employees. The IAM was interested but there were only 25 or so employees. In 2007 IAM organizers began soliciting Vought employees, with a door-to-door campaign. The union was eventually voted in the spring of 2008.

After the union got in, it began contract negotiations with Vought. I did not have a role in the contract negotiations between Vought and the IAM. I was a union member from the beginning. The IAM did not inform employees concerning the importance of issues being negotiated with Vought. At some point, the IAM must have known the contract it was

negotiating was likely to be rejected because the meeting in November 2008 at which the contract was to be ratified was billed as a normal union meeting with no mention of a ratification vote. The IAM knew that if it said a contract was being voted on workers would show up at the meeting and reject the contract. The IAM was desperate to get a contract signed. I recall the IAM assuring employees that any bad things in the contract would later be improved. I, myself, made similar arguments to employees in an attempt to convince them that no matter what was in the contract, we would be stronger with it than without it.

Of all the union members in the unit only 13 attended the contract ratification meeting. Those few in attendance ratified the IAM's contract by vote of 12-1. All of the provisions of the new IAM contract were worse than what Vought employees already had without a contract. The IAM upper leadership itself did not monitor the Vought negotiations. Employees lost medical, dental, and short term disability. Additionally, dues were set to increase, although this requirement was later reduced due to the strong backlash in the unit. The Vought employees' dissatisfaction with the IAM's actions surrounding the contract and the contract, itself, only increased when workers were laid off in the weeks following the new contract.

After the contract ratification, employees attempted to contact IAM leaders concerning the contract. The IAM Grand Lodge representatives held one meeting and then we had no contact from the IAM Leadership for four months. Nobody was even able to make contact with union leadership during that time. IAM came back into the picture in about March or April 2010. Around this time, I was voted in as Local President and continued in that position until about September 2009, when the union was decertified. There was nothing I could do with respect to influencing union leadership or reassuring employees about our future under the new contract

and with the union. I tried to promote a positive attitude towards the union despite the enormous dissatisfaction in the plant.

In 2009 I became President of IAM Local Lodge 787. As Local President, I got to see what was going on behind the scenes with the union. The experience was embarrassing and humiliating. I believe I was at that time the only IAM woman local president, and I believe this made my dealings with IAM leadership in Seattle even more difficult. On various occasions, Union leadership in Seattle made public very negative, humiliating comments concerning the South Carolina unit and South Carolina workers, generally. These comments appeared in the newspaper in Seattle and Charleston.

In July 2009, it was announced that Boeing had bought the Vought facility. Soon after Boeing took over, we had an initial meeting between the union leadership and Boeing executives. That meeting left me with the impression the relationship between Boeing and the union was going to be a successful one and that Boeing was keen to begin negotiations on a new contract which could improve on the previous one that employees were so unhappy about.

Having said that, I was not surprised by the Unfair Labor Practice filed by the IAM in Seattle/Everett against Boeing. They are violating my right to work with a choice. Isn't that what being an American is all about: a choice? That is MY right! They made it perfectly clear to us that they did not want the 787 built here in South Carolina.

After Boeing bought the facility, I was aware of a petition being organized to decertify the union. I had no role in the signature gathering for the decertification petition. During the months leading up to the decertification, I was concerned about how I would be treated if the union was decertified, both by the company and my fellow employees. I expected to face retaliation from

the company after my role as union president. I was completely wrong about this. Before the decertification election, one of my supervisors told me that whatever the result was, all he cared about was that we do our jobs, and that my role as union president would not affect how I was treated by the company at all. He also told me to inform him if any employee mistreated me. None did.

The decertification election was held on September 10, 2009, and the IAM was voted out by a tally of 199-69. After the decertification of the IAM, work continued as normal. In the only communication on the subject that I recall coming from Boeing, the company thanked employees for "giving the company the chance to work together." With respect to pay and terms of work, we were placed within the normal Boeing cycle.

Recently, the union has again made contact with employees through home visits. The campaign was very poor in comparison to the first one several years ago.

The Boeing Campus in North Charleston, SC is divided into three production buildings. The former Vought facility is now identified as Building 88-19. It is the Aft-Body Manufacturing building where Sections 47 and 48 are made.

Next is the former Global Facility, now known as Building 88-20. This is Mid-Body Assembly Facility where the mid-body sections are flown in from Italy and mated with the center wing section brought in from Japan. Once all the sections are joined and mated with the center wing section, the remainder of the systems components and wiring are installed completing the center third of the aircraft.

The newest facility is the Final Assembly and Delivery Building, also known as FA&D. This is where the forward third of the aircraft is brought in from Spirit Aircraft in Kansas, the

Mid-Body brought in from Building 88-20, the Aft-Body section from Building 88-19 as well as the wings from Japan and Horizontal stabilizer from Italy. All the sections are then combined to create a complete 787 Dreamliner aircraft. The interiors will come from the IRC facility being completed a few miles away, and also be installed at FA&D.

Building 88-19 is currently staffed by about 1200 employees. Building 88-20 is currently staffed by about the same amount. FA&D currently has somewhere in the range of 800 to 1000 employees with 10 classes going around the clock with several hundred more employees preparing to work in the FA&D building. When it is fully staffed, FA&D will employee some 3800 employees.

I work in a building usually called "off-site warehouse" where the 787 parts are received. I am a quality inspector. I inspect the incoming parts before they are issued to production. I also inspect and ship parts to Everett. It is my responsibility to resolve any issues with the parts before they go to the program.

Thousands of people will be unemployed if the NLRB complaint is successful. All of our work is for the 787. Losing my job at Boeing will be personally catastrophic to myself and the workers at the North Charleston Boeing facility. We are home-owners, we have families that will be affected. I understand that the NLRB General Counsel's remedy in this case will force Boeing to discontinue the final assembly and delivery work in Charleston, and transfer it to Seattle. This remedy is grossly unfair and would devastate our community and thousands of families. That is why I decided to intervene in this case. I and two of my fellow employees are being represented by attorneys from the National Right To Work Foundation. So far, we have not been allowed to become full participants in the case. It seems neither the Judge nor the Government, nor the

Union think we even have a legal interest in this case.

It is an absolute certainty that many Charleston-based employees including me, will lose our jobs with Boeing in South Carolina if the General Counsel's proposed remedy is adopted. Boeing is one of the best employers in this area. I would like to continue working for Boeing, but if the 787 program is moved to Washington I will not be able to accept a relocation offer. Apart from my family and personal obligations, I would not accept an offer which would force me to join a union in order to have a job. Here, at least people have a choice. There, they have none. We should not be penalized for not wanting a union. The union doesn't want the program here, period. There was zero support from the IAM in Everett for the South Carolina workers even when we had a union. From what I understand, no one there lost his/her job, no lines were closed down. Actually more people have been hired. Where do you show retaliation?

One union official went on the public record and said that he would try to keep work from coming to our plant in Charleston because of the decertification. There were numerous negative comments made by union leaders in Seattle about South Carolina, the education of the workers here, and how it would be impossible for us to successfully build the Dreamliner.

I have chosen to exercise my rights as a citizen of the United States to live and work in South Carolina. Our personal experience with the IAM has been very bad. Although I have nothing against unions, in principle, I strongly believe that membership in a union and representation by a union should not be compulsory. We had a union in our plant. The majority of employees did not want to be represented by that union so it got voted out. Now it seems we are being punished for that choice. I strongly believe that employers should not be told by the federal government or a union where they can establish their operations. If Boeing thinks it can

get the job done more profitably and successfully in South Carolina, that's Boeing's decision to make.

I declare under penalty of perjury that the foregoing is true and correct.

Chairman ISSA. Thank you. Thank you very much.

Ms. RAMAKER. You're welcome.

Chairman ISSA. Mr. Whitman.

STATEMENT OF NEIL WHITMAN

Mr. WHITMAN. Thank you.

Mr. Chairman, members of the committee, distinguished visitors, I want to thank you for allowing me the opportunity to discuss the various positive impact that Boeing has had both on my small business and the Charleston community.

My name is Neil Whitman. My wife, Melinda; my daughter, Katie; and I own and operate Dunhill Staffing Systems based here in Charleston.

In 2000, Melinda and I relocated to the Charleston community with the idea of starting our own business. Like many Americans, we dreamed of owning a business. On August 15, 2001, we launched Dunhill Staffing Systems of Charleston.

We are a provider of fee-paid recruiting for technical and sales professionals throughout the Southeast, with a special emphasis on our local market. Some would call us headhunters. We prefer to be called executive search consultants.

Our plans for a grand opening on September 17th changed abruptly when our Nation was attacked on September the 11th. Despite the shock this had on our Nation's economy, my business persevered and was profitable in its first year of operation.

As our business grew, I hired more consultants, eventually employing seven full-time staff members. They were well paid and received benefits. We became involved in our local community, including our Chamber of Commerce; SCAPS, our State personnel association; the local school district; our churches; and donated time and money to numerous nonprofits throughout the Charleston area.

My business plan called for the launching of an hourly staffing division, which we did in 2005. Good fortune smiled on us again, and this sector was profitable in 1 year.

The announcement made in 2004 that Vought Aircraft and Global Aeronautica were coming to Charleston was, indeed, good news. Aircraft manufacturing represented an important new business sector for our region.

Soon after this announcement, my company was contacted about providing services to these companies. Our business volume grew, particularly with Global Aeronautica. And it grew at a steady pace, and they eventually became our largest customer.

My decision to launch our hourly division as a hedge against an economic downturn was validated when our search business took a dramatic downturn in the fall of 2008. The ripple effect of the housing market meltdown, the fall of Lehman Brothers, and the stock market plunge combined to virtually kill our most profitable sector.

I don't mind telling you I was scared that our business wouldn't make it. Thankfully, companies supporting Boeing's 787 program here in Charleston continued to grow, and this sustained our business through 2009. We placed dozens of individuals with Global

Aeronautica in good-paying jobs that offered benefits and the opportunity for many of our contractors to become full-time staff.

Many of the people we placed were unemployed at the time with dim prospects for the future. I know they were all glad to have good-paying jobs in a tough economic time.

The announcement on October 28, 2009, that Boeing had picked Charleston for their new assembly plant was the best economic news in a long while. I knew immediately this was a game-changer for our area and offered great potential for my small business.

I learned that Boeing was committed to utilizing local resources and that it gave generously to the communities where they were located. All of this proved to be true.

After numerous meetings and intense negotiation, my company was added to Boeing's list of national contract labor suppliers, and now we get to compete for their business every single day. To handle this additional volume of work, I've added a full-time account manager who focuses exclusively on their needs.

The jobs we fill all pay well above the local average and provide an entry point for people to join Boeing as regular full-time employees. My business has grown. We've added over 100 employees, and I've seen my revenue grow by 295 percent. And this is counter to the current job market, which, as recent news indicates, continues to be very difficult.

Once again, if not for Boeing business, my small business would be very different. Mine is not the only small business that's felt the positive impact of Boeing's presence in Charleston. Recently, I had a conversation with an engineer from a local engineering company who told me that without Boeing they'd be out of business. I have no doubt there are many such stories to be told here in Charleston.

If Boeing is forced to shut down their Charleston operations, it would mean the loss of thousands of direct and indirect jobs in an economy that is just barely recovering from the recession. Again, I don't know if we'd survive.

Boeing has proven, as promised, to be a good corporate citizen. Boeing executives and employees are buying houses, attending our churches, participating in our Chambers of Commerce, and are actively involved in several nonprofits in our area. They've given over $1 million to local charities and I believe will only continue to make Charleston a better community for all of us to live, learn, work, and play. Losing Boeing as a result of this lawsuit would cost thousands of jobs and set our community back for years.

When I first heard of this lawsuit, I was more than a little concerned. Many of my friends and business colleagues wondered why and how our Government would consider such an action, which appears to be an assault on our free enterprise system.

Each and every day, businesses large and small must make decisions about where to invest their limited resources. That's what I did 11 years ago when I decided to start my own small business in Charleston. I did so after my research showed Charleston to be a good market, and that decision proved to be a good one.

Boeing did the same thing and decided to invest several hundred million, now a billion, in our community. I believe they did so after carefully considering a multitude of factors, including the positive labor climate in our State.

This lawsuit by an agency of our Federal Government is, in my opinion, against all that makes our economic system special. It will have negative consequences for future generations of entrepreneurs and business leaders who must be able to locate their businesses without the threat of Government intervention. The freedom to make these kind of decisions must be preserved.

Thank you.

[The prepared statement of Mr. Whitman follows:]

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Thank you for allowing me an opportunity to discuss the very positive impact Boeing has had on both my small business and the Charleston community. My name is Neil Whitman. My wife Melinda, daughter Katie, and I own and operate Dunhill Staffing Systems based here in Charleston.

In 2000, Melinda and I relocated to the Charleston community with the idea of starting our own business. Like many Americans we dreamed of owning a business. On August 15, 2001, we launched Dunhill Staffing Systems of Charleston. We provide fee paid recruiting for technical and sales professionals throughout the southeast with a special emphasis on our local market. Some would call us headhunters but we prefer to be called executive search consultants. Our plans for a grand opening on September 17th changed abruptly when our nation was attacked on September the 11th. Despite the shock this had on our nation's economy my business persevered and was profitable in its first full year of operation. As our business grew I hired more consultants eventually employing seven staff members. They were well paid and received a full benefits package. We became involved in our local community including our Chamber of Commerce, SCAPS our state personnel association, the local school district, our churches, and donated time and money to numerous non-profits throughout the Charleston area. My business plan called for the launching of an hourly staffing division which we did in 2005. Good fortune smiled on us again and this sector was profitable in one year.

The announcement made in 2004 that Vought Aircraft and Global Aeronautica were coming to Charleston was good news. Aircraft manufacturing represented an important new business sector for our region. Soon after this announcement my company was contacted about providing services to these companies. Our business volume, particularly with Global Aeronautica, grew at a steady pace and it eventually became our largest customer. My decision to launch our hourly division as a hedge against an economic downturn was validated when our search business took a dramatic downturn in the fall of 2008. The ripple effect of the housing market meltdown, the fall of Lehman Brothers, and

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the stock market plunge combined to virtually kill our most profitable sector. I don't mind telling you I was scared that our business wouldn't make it. Thankfully, companies supporting Boeing's 787 program here in Charleston continued to grow and this sustained our business through 2009. We placed dozens of individuals with Global Aeronautica in good paying jobs that offered benefits and the opportunity for many of our contractors to become full time staff. Many of the people we placed were unemployed at the time with dim prospects for the future. I know they were all glad to have good paying jobs in a tough economic time.

The announcement on October 28, 2009 that Boeing had picked Charleston for their new assembly plant was the best economic news in a long while. I knew immediately this was a game changer for our area and offered great potential for my small business. I learned that Boeing was committed to utilizing local resources and that it gave generously to the communities where they were located. All of this proved to be true. After numerous meetings and intense negotiation my company was added to Boeing's list of national contract labor suppliers and now we get to compete for their business every single day. To handle this additional volume of work I've added a full time account manager who focuses exclusively on Boeing's staffing needs. The jobs we fill all pay well above the local average and provide an entry point for people to join Boeing as regular full time employees. Since being approved as a Boeing supplier we have placed well over 100 employees with them here in Charleston and my revenue has grown 295%. This is counter to the current job market which, as recent news indicates, continues to be very difficult. If not for this Boeing business my small business would be very different. Mine is not the only small business that's felt the positive impact of Boeing's presence in Charleston. Recently I had a conversation with an engineer from a local geotechnical engineering firm who told me that without Boeing they'd be out of business. I have no doubt there are many such stories to be told here in Charleston. If Boeing is forced to shutdown their Charleston operations it would mean the loss of thousands of direct and indirect jobs in an economy that is just barely recovering from the recession. I don't

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know if the small business I created over ten years ago and hope to pass on to my daughter would survive.

Boeing has also proven, as promised, to be a good corporate citizen. Boeing executives and employees are buying houses, attending our churches, participating in our Chambers of Commerce, and are actively involved in several non-profits in our area. They've given over $1 million to local charities and I believe will only continue to make Charleston a better community to live, learn, work, and play. Losing Boeing as a result of this lawsuit would cost thousands of jobs and set our community back for years.

When I first heard of this lawsuit I was more than a little concerned. Many of my friends and business colleagues wondered why and how our government would consider such an action which appears to be an assault on our free enterprise system. Each and every day businesses large and small must make decisions about where to best invest their limited resources. That's what I did eleven years ago when I decided to start my own small business. I did so after my research showed Charleston to be a good market. That decision proved to be a good one. Boeing did the same thing and decided to invest several hundred million dollars in our community. I believe they did so after carefully considering a multitude of factors including the positive labor climate in our state. This lawsuit, by an agency of our federal government is, in my opinion, against all that makes our economic system special. It will have negative consequences for future generations of entrepreneurs and business leaders who must be able to locate their businesses without the threat of government intervention. The freedom to make these kind of decisions must be preserved.

I thank you for allowing me this time to speak to you and am happy to answer your questions.

Chairman ISSA. Thank you very much.

Mr. Solomon.

STATEMENT OF LAFE SOLOMON

Mr. SOLOMON. Mr. Chairman and distinguished members of the committee, I appear before you today as the acting general counsel of the National Labor Relations Board, having been appointed to this position by President Obama on June 21, 2010.

I would like to start by acknowledging that workers in North Charleston are feeling vulnerable and anxious because they are uncertain as to what impact any final decision may have on their employment with Boeing. These are difficult economic times, and I truly regret the anxiety this case has caused them and their families.

The issuance of the complaint was not intended to harm the workers of South Carolina, but rather to protect the rights of workers, regardless of where they are employed, to engage in activities protected by the National Labor Relations Act without fearing discrimination.

Boeing has every right to manufacture planes in South Carolina or anywhere else, for that matter, as long as those decisions are based on legitimate business considerations. This complaint was issued only after the parties failed to informally resolve this dispute.

I personally met with the parties, and I tried for 3 months to facilitate a settlement of this case. I remain open to playing a constructive role in assisting the parties to settle this dispute without the costs and uncertainties associated with extended litigation.

I believe that, given the parties' longstanding bargaining relationship, a settlement would serve the interests of the parties and the workers and would promote industrial peace. In the absence of a mutually acceptable settlement, however, both Boeing and the machinists union have a legal right to present their evidence and arguments in a trial and to have those issues decided by the board and Federal courts.

All charges filed with our regional offices are carefully and impartially investigated to determine whether there is reasonable cause to believe that under the board's precedents an unfair labor practice has been committed. Fairness to the parties and sound development of the law weighs in favor of presenting these types of cases to the board for decision, subject to review by the courts.

I would not be fulfilling my responsibilities if I turned a blind eye to evidence that an unfair labor practice may have occurred. I took an oath to enforce the National Labor Relations Act and to protect workers from unlawful conduct.

The general counsel's concern with fairness to the parties does not end with the issuance of the complaint. Throughout the proceeding, the general counsel remains master of the complaint and is responsible to ensure that the prosecution of a case is justified by the facts and law.

As such, it remains open to the general counsel to make concessions on issues of fact or law and to pursue settlement discussions with the charged party, even over the objections of the charging party.

For all these reasons, the actual fairness of the proceedings before the board and, equally important, the perception that the board's administrative processes are fair vitally depends on the public and the parties retaining the confidence that the general counsel is carrying out his prosecutorial responsibilities on the basis of fact and law in the case and is not making decisions on the basis of political or other matters not properly before the board.

As you know, the Boeing hearing began on Tuesday of this week before an administrative law judge in Seattle, Washington. I am actively involved in overseeing the Boeing litigation and in strategic decisions necessary for the prosecution of this case.

My obligation to protect the independence of the Office of the General Counsel and the integrity of the enforcement process restricts my ability to offer insight into the decisionmaking here. I hope you will share my commitment that these proceedings not be construed as an effort by the Congress to exert pressure or attempt to influence my prosecutorial decisions in this case, which have been and will continue to be made based on the law and the merits and in a manner which protects the due process rights of the litigants.

I come here voluntarily out of respect for the oversight role of Congress. I will do my best to answer your questions, consistent with my obligations to the parties and to the American public with respect to the ongoing Boeing case.

The adjudicatory process must be fair and impartial so that the parties' due process rights, which are guaranteed by the Constitution, are preserved. Our American legal system of justice is guided by these fundamental principles.

Thank you.

[The prepared statement of Mr. Solomon follows:]

Mr. Chairman and distinguished Members of the Committee:

I appear before you today as the Acting General Counsel of the National Labor Relations Board, having been appointed to this position by President Obama on June 21, 2010. For the 38 years before my appointment, I have served as a career civil servant in many positions throughout the Agency, ranging from field examiner, staff attorney, supervisory attorney, and finally, as a member of the Senior Executive Service.

I would like to start by acknowledging that workers in North Charleston are feeling vulnerable and anxious because they are uncertain as to what impact any final decision may have on their employment with Boeing. These are difficult economic times, and I truly regret the anxiety this case has caused them and their families. The issuance of the complaint was not intended to harm the workers of South Carolina, but rather, to protect the rights of workers, regardless of where they are employed, to engage in activities protected by the National Labor Relations Act, without fearing discrimination. Boeing has every right to manufacture planes in South Carolina, or anywhere else, for that matter, as long as those decisions are based on legitimate business considerations.

This complaint was issued only after the parties failed to informally resolve this dispute. I personally met with the parties and I tried for three months to facilitate a settlement of the case. I remain open to playing a constructive role in assisting the parties to settle this dispute without the costs and uncertainties associated with extended litigation. I believe that, given the parties' longstanding bargaining relationship, a settlement would serve the

interests of the parties and the workers and would promote industrial peace. In the absence of a mutually acceptable settlement, however, both Boeing and the Machinists Union have a legal right to present their evidence and arguments in a trial and to have those issues be decided by the Board and federal courts.

I would like to begin by describing briefly the relevant regulatory framework and the role of the Office of General Counsel within that framework. The National Labor Relations Act divides responsibility over private-sector labor relations between the National Labor Relations Board and the General Counsel of the Board. The Board adjudicates cases in accordance with the procedures set forth in the Act itself, the Administrative Procedures Act, and the Constitution. The Office of the General Counsel serves as a prosecutor of labor law violations in such cases.

The Office of the General Counsel was created by the Taft-Hartley Amendments of 1947. Under Section 3(d) of the amended Act, the General Counsel has "final authority", on behalf of the Board, with respect to the investigation and prosecution of unfair labor practice complaints. In order to ensure that the newly-established General Counsel of the NLRB would have both the independence and resources necessary to make final, unreviewable decisions in typically heated labor and management controversies, Section 3(d) also provided that, with the exception of administrative law judges and legal assistants to Board members, General Counsel "shall exercise general supervision over all attorneys employed by the Board" and would have general supervision "over the officers and employees in the regional offices." Like my predecessors, I have gone to

great lengths to ensure that all unfair labor practice charges, which must be initiated by private parties, are fairly considered, relying on "findings, reasons, precedents, checks through appeals and through internal supervision, and procedural protections." *See* K. Davis, *Discretionary Justice* 207 (1969).

To that end, all charges filed with our regional offices are carefully and impartially investigated to determine whether there is reasonable cause to believe that, under the Board's precedents, an unfair labor practice has been committed. Fairness to the parties and sound development of the law weighs in favor of presenting these types of cases to the Board for decision, subject to review by the courts. See Kenneth C. McGuiness, *Effect of the Discretionary Power of the General Counsel on the Development of the Law*, 29 Geo. Wash. L.Rev. 385, 397 (1960). I would not be fulfilling my responsibilities if I turned a blind eye to evidence that an unfair labor practice may have occurred. I took an oath to enforce the National Labor Relations Act and to protect workers from unlawful conduct.

The General Counsel's concern with fairness to the parties does not end with the issuance of the complaint. The Supreme Court has recognized that the Act and the Board's rules are designed to ensure that proceedings are conducted in a manner that respects the private rights of the charging party and the charged party. *Automobile Workers v. Scofield*, 382 U. S. 205, 217-221 (1965).

The Supreme Court has also recognized that "Congress intended to create an officer independent of the Board to handle *prosecutions,* not merely the filing of complaints." *NLRB v. United Food & Comm. Workers Un.*, 484 U.S. 112, 127 (1987) (emphasis in original). Thus, throughout the proceeding, the General Counsel remains master of the complaint and the charging party is not permitted to pursue alternative theories of a violation without the consent of the General Counsel. *See, e.g.*, *Teamsters, Local 282 (E.G. Clemente Contracting Corp.)*, 335 NLRB 1253, 1254 (2001). Throughout the proceedings, the General Counsel is responsible to ensure that the prosecution of the case is justified by the facts and law. As such, it remains open to the General Counsel to make concessions on issues of fact or law and to pursue settlement discussions with the charged party -- even over the objections of the charging party.

For all these reasons, the actual fairness of the proceedings before the Board -- and, equally important, the perception that the Board's administrative processes are fair -- vitally depends on the public and the parties retaining the confidence that the General Counsel is carrying out his prosecutorial responsibilities on the basis of the facts and law in the case, and is not making decisions on the basis of political or other matters not properly before the Board.

As you know, the Boeing hearing began on Tuesday of this week before an administrative law judge in Seattle, Washington. I am actively involved in overseeing the Boeing litigation and in strategic decisions necessary for the prosecution of this case. My obligation to protect the independence of the Office of the General Counsel and the

integrity of the enforcement process restricts my ability to offer insight into the decision-making here. I hope you will share my commitment that these proceedings not be construed as an effort by the Congress to exert pressure or attempt to influence my prosecutorial decisions in this case, which have been and will continue to be made based on the law and the merits and in a manner which protects the due process rights of the litigants.

I come here voluntarily out of respect for the oversight role of Congress. I will do my best to answer your questions, consistent with my obligations to the parties and to the American public with respect to the ongoing Boeing case. The adjudicatory process must be fair and impartial so that the parties' due process rights, which are guaranteed by the Constitution, are preserved. Our American legal system of justice is guided by these fundamental principles.

Chairman ISSA. Thank you.

Mr. Miscimarra. Was that closer?

STATEMENT OF PHILIP MISCIMARRA

Mr. MISCIMARRA. Much closer, Mr. Chairman.

Chairman Issa, Representative Maloney, and committee members, thank you for the invitation to appear today.

I'll start with a pair of opening disclaimers. My view of the law differs from what is reflected in the complaint that's been issued by the acting general counsel against Boeing. Disclaimer number two, this is not the first time different views have been expressed about major business changes.

Three factors, in my view, help explain why the litigation against Boeing has resulted in such controversy. The first factor involves NLRA process. When dealing with major business decisions, the board litigation resembles a tortoise that can't win any race because the economy now moves at speeds not imaginable when the statute was passed.

It's true the general counsel only decides whether to issue a complaint, and the Boeing complaint does not constitute a finding of unlawful conduct. But the Boeing complaint places a $750 million investment decision on a very long litigation treadmill. And especially when the litigation seeks to have such a major investment redone somewhere else, which might be ordered 5 or 10 years down the line, the complaint's issuance has immediate adverse consequences.

The board's general counsel acts like a traffic cop. He can issue a citation, but he doesn't write the laws, and he doesn't decide the cases. But traffic citations don't routinely involve impounding the car for 5 to 10 years, and that's the practical effect when an NLRB complaint challenges major investment decisions.

The second factor I'll discuss briefly involves the substance of existing law. The NLRA prohibits a relocation motivated by anti-union hostility, but the cases in this area require some tangible transfer and removal of preexisting work. Boeing's assembly plant in South Carolina is new investment that has not involved any tangible relocation from somewhere else.

Now, one focus in the complaint against Boeing are statements to the effect that South Carolina investment decision, that decision was influenced by past work stoppages at Boeing's unionized facilities in Washington State. Now, those unionized operations had five strikes since 1975. It included a 58-day strike in 2008, which shut down the Dreamliner production when the program was already 15 months behind schedule. And that strike reportedly cost Boeing $1.8 billion in lost revenues.

Now, companies are permitted to make decisions based on economic costs that exist because of collective bargaining or strikes. So it's not surprising that a company like Boeing, when making a major investment decision, would want to maximize return and minimize downtime. The act prohibits discriminatory relocations, but it doesn't require that employers make irrational decisions about new investment.

The third factor I'll mention is the outcome or remedy being sought in the Boeing litigation. Even if some remarks were found

to be objectionable—and such a finding has not been made in the case—that would not justify, in my view, the remedial order requested in the complaint.

Now I greatly respect the members of the NLRB. I respect the acting general counsel and others that are employed in the agency. But it would benefit everyone if there is some adjustment in the factors that I've mentioned, which could accomplish a resolution of the Boeing dispute.

Now I'll close today by mentioning a relocation that was announced on June 10th. I'm not talking about June 10th a week ago. This other relocation was announced on June 10th 30 years ago, June 10, 1981, and it took 13 years before that litigation ended.

That litigation was called Dubuque Packing Co., and here's what the Court of Appeals said when it reviewed that dispute. "This case presents hard questions. Indeed, some of the most polarizing questions in contemporary labor law. While we are sympathetic to the task that lies ahead for the National Labor Relations Board, our sympathy does not lead us to shirk our duty to hold the board accountable for the rationality of its decisions."

That concludes my prepared testimony. Again, thank you. I'll be happy to answer any questions.

[The prepared statement of Mr. Miscimarra follows:]

Statement of

Philip A. Miscimarra
Senior Fellow, The Wharton School, University of Pennsylvania
Partner, Morgan Lewis & Bockius LLP

before the

Committee on Oversight and Government Reform
United States House of Representatives

June 17, 2011

Capital Investment, Relocations and Major Business Changes Under the NLRA

Chairman Issa, Representative Maloney, and Committee Members, thank you for your invitation to participate in this hearing. I am honored to appear before you today.[1]

I am a Senior Fellow at the University of Pennsylvania's Wharton School and for more than 30 years I have been associated with the Wharton Center for Human Resources (previously known as the Wharton Industrial Research Unit). The majority of my academic work has dealt with the National Labor Relations Act ("NLRA" or "Act")[2] and the Act's treatment of major business changes including relocations and significant capital investment decisions.[3] I am also a partner in the law firm of Morgan Lewis & Bockius LLP, and I have been a labor lawyer in private practice representing management since 1982.

Summary – The Perfect Storm

Capital investment and major business changes have always warranted special attention under the National Labor Relations Act.[4] These issues have been addressed in many decisions

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[1] My testimony reflects my own views and should not be attributed to The Wharton School, the University of Pennsylvania, or Morgan Lewis & Bockius. I am grateful to David R. Broderdorf, Ross Friedman, Stephanie Christiansen-LaRocco and Lavanga V. Wijekoon for assistance.

[2] 49 Stat. 449 (1935), 29 U.S.C. §§ 151 *et seq.*

[3] *See, e.g.*, Philip A. Miscimarra, THE NLRB AND MANAGERIAL DISCRETION: PLANT CLOSINGS, RELOCATIONS, SUBCONTRACTING, AND AUTOMATION (1st ed. 1983), cited by the NLRB as containing a "comprehensive review of prior decisions in this area, including cogent criticism of inconsistency and ambiguities." *Milwaukee Spring Div. of Illinois Coil Spring Co. ("Milwaukee Spring II")*, 268 N.L.R.B. 601, 603 n.12 (1984), *affd sub nom. Int'l Union, UAW v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985). *See also* Philip A. Miscimarra, Ronald Turner, Ross H. Friedman, Shannon M. Callahan, Brandon R. Conrad, Michael E. Lignowski & Andrew Scroggins, THE NLRB AND MANAGERIAL DISCRETION: SUBCONTRACTING, RELOCATIONS, CLOSINGS, SALES, LAYOFFS, AND TECHNOLOGICAL CHANGE (2d ed. 2010) (hereinafter "MANAGERIAL DISCRETION, 2d ed."); Herbert R. Northrup & Philip A. Miscimarra, GOVERNMENT PROTECTION OF EMPLOYEES INVOLVED IN MERGERS AND ACQUISITIONS (1st ed. 1989 and 1997 supp.); Philip A. Miscimarra & Kenneth D. Schwartz, *Frozen in Time – The NLRB, Outsourcing and Management Rights*, 18 J. LAB. RES. 561 (1997).

[4] The NLRA was created during the Great Depression, and was adopted to foster collective bargaining for the overriding purpose of eliminating burdens and obstructions on commerce. *See* NLRA § 1, 29 U.S.C. § 151; *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981) (citation omitted). Even in 1937, when the Act was two years old, the Supreme Court stated that work stoppages had an "immediate" and "potentially catastrophic" impact on the "far-flung activities" of a company. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937).

of the National Labor Relations Board ("NLRB" or "Board") and the courts, including nearly a dozen U.S. Supreme Court decisions.[5]

Based on these cases, three factors – taken together – help explain why the litigation against Boeing presents such significant problems.[6] The first factor involves NLRA *process*. Second is the *substance* of NLRA case law regarding capital investment decisions and major business changes. Third, the Boeing litigation involves very significant concerns about the *outcome* or *remedy* being sought in the case.

I have a pair of preliminary disclaimers.

- My view of existing case law differs from what has been advanced by the Board's General Counsel concerning the claims asserted against Boeing, which challenge Boeing's decision to create a second 787 Dreamliner assembly facility in South Carolina.
- It does not break new ground for there to be differences regarding how the law applies to fundamental business changes. "Even with the luxury of backward-looking analysis after the relevant events have already occurred, in many cases NLRB members have been unable to agree among themselves concerning applicable standards. In other cases, a similar tug-of-war has been evident between the NLRB, its ALJs and/or the courts of appeals."[7]

The differences in existing case law can present challenges when the General Counsel decides what cases to pursue.

But the challenges facing employers are magnitudes greater. Companies like Boeing must, in real time, attempt to interpret and comply with existing law while making million and billion dollar investment decisions, with spillover consequences affecting employees, family members, local and state governments, customers, vendors, suppliers and the rest of the economy.

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[5] Supreme Court cases addressing fundamental business changes under the NLRA or the Labor Management Relations Act ("LMRA") include *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U. S. 27 (1987); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *NLRB v. Deena Artware, Inc.*, 361 U.S. 398 (1960); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1945); *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942).

[6] In my testimony, I do not differentiate between "General Counsel" and "Acting General Counsel," even though the General Counsel role at the Board is currently being performed by Acting General Counsel Lafe Solomon, who I respect personally and professionally. My comments focus on the General Counsel's institutional and functional role and not Mr. Solomon individually.

[7] MANAGERIAL DISCRETION, 2d ed., at 568.

Background

There is not yet an evidentiary record in the Boeing case, and I have not discussed the case with the Acting General Counsel, representatives of Boeing or other litigants.[8] However, basic facts and the claims asserted against Boeing have been outlined in the Board's complaint and in public statements released by the parties.

Boeing produces military and commercial aircraft at facilities throughout the United States, including one facility in Everett, Washington, where employees are represented by the International Association of Machinists and Aerospace Workers ("IAM" or "Union").[9] Boeing employs a total of approximately 25,000 IAM-represented employees in the Puget Sound area.[10]

In 2007, Boeing commenced assembly of the 787 Dreamliner at the Everett facility,[11] with planned production of seven 787 Dreamliners per month.[12]

The IAM engaged in five strikes at Boeing's Puget Sound facililties since 1975,[13] including a 58-day strike in 2008 which shut down all 787 production when the Dreamliner program reportedly was already 15 months behind schedule.[14]

Based on a backlog of orders extending through approximately 2020 (among other things), Boeing decided to create a second 787 Dreamliner assembly line, which was projected to produce three additional 787 Dreamliners per month.[15] This second assembly line reportedly has involved capital investment of more than $750 million.[16]

Boeing's IAM collective bargaining agreement gave Boeing the unilateral right to decide where work would be located (which the Board's General Counsel concluded was a waiver of

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[8] Under the Board's normal process, the Administrative Law Judge ("ALJ") hearing is held for the purpose of developing a detailed factual record. The scheduled ALJ hearing in the Boeing litigation commenced June 14, 2011 and is likely to continue for some time. The facts referenced in my testimony are based on the Board's Complaint and Notice of Hearing (dated April 20, 2011) ("Complaint"), Boeing's Answer (dated May 4, 2011) ("Answer"), public statements released by the Board and Boeing, and other facts reported in the media. These sources obviously are not equivalent to testimony and exhibits admitted in a formal hearing, nor do they provide the opportunity for cross examination or credibility determinations.

[9] Complaint ¶¶ 2, 3, 5.

[10] Statement of J. Michael Luttig, Senate Committee on Health, Education, Labor and Pensions, p. 4 (dated May 12, 2011) ("Luttig Statement").

[11] Luttig Statement, p. 3.

[12] Letter from J. Michael Luttig to Lafe E. Solomon, May 3, 2011, p. 6 ("Luttig Letter"). Boeing has described the 787 Dreamliner as a revolutionary airpline with advanced electric systems and significantly greater energy efficiency than comparably sized airplanes. Luttig Statement, p. 1.

[13] The IAM engaged in strikes during 1977, 1989, 1995, 2005 and 2008. Complaint ¶ 5(d); Answer, Response to Specific Allegations of the Complaint, ¶ 5(d).

[14] Luttig Statement, p. 4.

[15] Luttig Statement, pp. 3-4; Luttig Letter, p. 6.

[16] "Boeing Cuts Ribbon on $750 Million North Charleston Plant," Greenville News, June 11, 2011. Boeing has reported that the North Charleston facility has involved an estimated financial commitment exceeding $1 billion. Luttig Statement, p. 7.

any Union bargaining rights).[17] Nonetheless, Boeing engaged in discussions with the IAM regarding the possibility of locating the additional 787 Dreamliner assembly line in Puget Sound, but Boeing and the IAM were unable to agree on mutually acceptable terms.[18]

Regarding Boeing's possible creation of the second assembly line in South Carolina, state government officials in South Carolina offered Boeing financial incentives amounting to hundreds of millions of dollars.[19] Boeing also reportedly considered South Carolina attractive because it would provide geographic diversity in final assembly, lower labor costs, and a favorable general business climate, among other things.[20] Boeing management also reportedly took into account "[t]he Company's inability to reach agreement with the IAM" which, it had been hoped, could have "ensure[d] long-term production stability in Everett."[21]

In late October 2009, Boeing announced that it decided to locate the second 787 Dreamliner assembly line in North Charleston, South Carolina.[22] According to Boeing, this decision has not caused any layoffs or loss of jobs within the Puget Sound bargaining unit, and no work or equipment has been removed or transferred away from Boeing's Puget Sound operations.[23]

Boeing has asserted that it could lawfully decide to locate the new production line in South Carolina "to protect the stability of the 787's global production system" and "to mitigate the harmful effects of an anticipated future strike."[24] The Complaint against Boeing alleges that Company representatives unlawfully discriminated against IAM-represented employees in Puget Sound because of their past or future strikes. Boeing representatives allegedly stated (i) the new South Carolina facility was intended "to reduce [Boeing's] vulnerability to delivery disruptions caused by work stoppages," (ii) the decision reflected a desire "to use a 'dual-

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[17] The collective bargaining agreement between Boeing and the IAM reportedly provides that the Company has the unilateral right to "designate the work to be performed by the Company and the places where it is to be performed." Luttig Statement, p. 5.

[18] Boeing and IAM representatives reportedly met seven times between August 27 and October 21, 2009. Luttig Statement, p. 5. In exchange for locating the second line in Washington State, Boeing reportedly sought a long-term contract with protection from production interruptions, and the IAM reportedly sought guaranteed future wage/benefit increases, a requirement that Boeing would locate future commercial aircraft work in the Puget Sound area (or face potential termination by the IAM of the collective bargaining agreement), and Boeing neutrality regarding future IAM organizing efforts elsewhere in the country. Luttig Letter, pp. 5-7.

[19] Luttig Statement, p. 7.

[20] *Id.*

[21] *Id.*

[22] Complaint ¶ 6(b); Answer, Response to Specific Allegations of the Complaint, ¶ 6(b); Luttig Statement, p. 7; "Boeing to Place Second 787 Assembly Line in North Charleston, SC," Boeing Media Release, Oct. 28, 2009; "Boeing Picks South Carolina for 2nd 787 Line," Seattle Times, Oct. 28, 2009; "Boeing Picks South Carolina for New 787 Line," Seattle Post-Intelligencer, Oct. 27, 2009.

[23] Luttig Statement, pp. 8-9; Luttig Letter, pp. 1-2. When Boeing made its announcement regarding the decision to create the second 787 Dreamliner assembly plant in South Carolina, it also announced plans to build a temporary 787 "surge" assembly line at Boeing's existing facility in Everett, Washington – where even more IAM-represented employees will work on a temporary basis – until the South Carolina plant reaches its projected production level. "Everett Will Get A Second 787 Line, Briefly," Seattle Times, Nov. 1, 2009. See also note 22, *supra*.

[24] Answer, Defenses, ¶ 3, Response to Specific Allegations of the Complaint, ¶¶ 6(a) to (e).

sourcing' system," and (iii) costs associated the new line in South Carolina were offset by "strikes happening . . . every three or four years in Puget Sound."[25]

The 787 Dreamliner production facility in South Carolina officially opened on Friday, June 10, 2011, and more than 1,000 employees have already been hired, with planned additional future hiring.[26]

1. NLRA Process: Delays, Costs, and Uncertainty

I will now turn to the factors which, in combination, have produced such intractable problems concerning the litigation against Boeing.

The first factor relates to process – the process for resolving NLRA disputes is poorly suited to deal with significant investment decisions. In these cases, current Board process conjures up the image of a tortoise that has little chance of winning any race, because the global economy requires movement at speeds not imaginable when the Act was adopted.

Some process-related elements in the Board case against Boeing should be clear to everyone:

- *The General Counsel does not decide these cases.* The General Counsel is responsible for investigating alleged NLRA violations *and* acting in the role of a prosecutor – *i.e.*, the General Counsel identifies the cases that warrant being litigated for resolution by the NLRB.
- *There has not been any "finding" of unlawful conduct by Boeing.* Cases involving alleged NLRA violations are resolved by the NLRB, not the General Counsel. If the Boeing litigation moves forward like most other NLRB cases, it will be years before the dispute even reaches the point where the Chairman and Members of the NLRB can give the case consideration and render a decision.

However, issuance of the complaint has placed Boeing's South Carolina investment on a very long NLRB litigation treadmill: there is typically an Administrative Law Judge ("ALJ") hearing, followed by post-hearing briefing, then "exceptions" can be filed which challenge designated parts of the ALJ ruling, the Chairman and Members of the NLRB evaluate the "exceptions," the NLRB itself renders a decision, and court appeals can be pursued (the courts, in turn, can return the case to the NLRB, along with other possible outcomes).

Merely describing these steps demonstrates the significant "process" problem that exists when an NLRB complaint issues against significant capital investment or major business changes. Contrary to the technical "process" rules applied by the Board, the complaint's issuance does *not* merely represent the start of litigation in these cases. As a practical matter,

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[25] Complaint ¶¶ 6(a) to (e).

[26] "A Grand Boeing Opening," The Post and Courier (Charleston, SC), June 11, 2011; "Boeing Opens New South Carolina 787 Final Assembly Building," Boeing Media Release, June 10, 2011; "Boeing Cuts Ribbon on $750 Million North Charleston Plant," Greenville News, June 11, 2011; Luttig Statement, p. 7.

the complaint's issuance means there will be significant adverse consequences for the employer – and others dependent on the employer – regardless of who eventually prevails:

- Issuance of a complaint means the challenged Company investment becomes the equivalent of a frozen asset, which is then basically tied up for years.
- It is often difficult, expensive or impossible to make further investment decisions while the NLRB litigation remains unresolved.
- Competitive demands or financial problems which gave rise to the challenged investment or business change are often made worse by the litigation.
- Litigation often makes it necessary to establish contingent reserves and to prepare for potential liabilities or remedies that may be ordered.
- Litigation requires significant management resources often including extensive involvement and time of the company's most senior executives.
- Litigation-related costs and uncertainty often add to costs and burdens associated with Company efforts to comply with the Act that have *already* taken place .
- These problems and costs do not only affect the company: they cause adverse consequences for employees, family members, customers and local businesses, state and local governments, surrounding communities, and – in many cases – even the union(s) and union members responsible for initiating the litigation.

The Board's General Counsel can be regarded as the agency's traffic cop. He does not write the laws, he does not resolve alleged violations, and the laws are important. However, alleged traffic violations do not routinely involve impounding the car. This is the practical effect when an NLRB complaint challenges capital investment and major business changes. The litigation creates significant costs and uncertainty which can severely damage the vehicles people need for stable employment and economic growth.

2. Substance: Capital Investment versus "Runaway Shop"

Concerning the substance of the law, several aspects of existing law appear to contradict claims that Boeing violated sections 8(a)(3) and (1) of the Act by locating a new, additional 787 Dreamliner production line in South Carolina.

(a) Existing Law Defers to Management Decisions Regarding Substantial Capital Investment and Entrepreneurial Changes

A recurring theme in cases involving major business changes has been a recognition that the NLRA has as its focus *employment* terms and conditions, and *not* business judgments involving "the core of entreprenurial control."[27] The NLRB also lacks authority to dictate the

[27] *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964). In *Fibreboard*, the Supreme Court held that maintenance subcontracting was a mandatory subject of bargaining under the NLRA, and the Court emphasized that "[n]o capital investment was contemplated" and mandatory bargaining "would not significantly abridge [the company's] freedom to manage the business." *Id.* at 213. In his well-known concurring opinion, Justice Stewart

substance of agreements unless they have been mutually agreed upon by the parties themselves.[28]

The Supreme Court has stated that, when adopting the NLRA, "Congress *had no expectation that the elected union representative would become an equal partner* in the running of the business enterprise in which the union's members are employed."[29] When a unionized facility is purchased and where the buyer hires all of the seller's employees (and, thus, is obligated to recognize and bargain with the union), the Supreme Court has held the buyer is not bound by the seller's labor contract because this could "*discourage and inhibit the transfer of capital.*"[30] Other decisions likewise show that NLRA legality often turns to a significant degree on the presence or absence of significant capital investment and other major business changes.[31]

Section 8(a)(3) of the Act prohibits antiunion discrimination "in regard to hire or tenure of employment or any term or condition of employment."[32] However, section 8(a)(3) cases also take into account whether there are substantial capital investment decisions or major business changes. The Supreme Court in *Textile Workers Union v. Darlington Manufacturing Co.*[33] held that employers can even *shut down* unionized operations based on hostility towards the union and

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stated more broadly that the Act did not require bargaining over managerial decisions "which lie at the core of entrepreneurial control. . . . Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment." *Id.* at 223 (Stewart, J., concurring). He concluded that the Act's bargaining obligations excluded "those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security." *Id.*

[28] *See* NLRA § 8(d), 29 U.S.C. § 158(d), which states the duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." *See also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937); NLRB *v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952), *citing* H.R. Rep. No. 245, 80th Cong., 1st Sess. 19 (1947).

[29] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 668, 676 (1981) (emphasis added). The Supreme Court in *First National Maintenance* held that employers could unilaterally decide to shut down a union-represented facility, without bargaining, even if the employer had other facilities that remained in operation. *Id.*

[30] *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287-88 (1972) (emphasis added).

[31] *See, e.g., Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 491 (11th Cir. 1982) (employer did not violate § 8(a)(3) based on shutdown of unionized facility followed by increased production at nonunion facility, where company made a "business decision" to consolidate operations when "faced with a deteriorating economic climate"); *Arrow Automotive Industries, Inc. v. NLRB*, 853 F.2d 223, 231-32 (4th Cir. 1988) (employer did not violate § 8(a)(5) when, following a lengthy strike at a unionized plant in Massachusetts, the employer closed the plant and relocated the work to South Carolina; the court concluded: "The magnitude of the decision to shut down an entire facility and to reallocate large amounts of capital underscores the need for certainty in the conduct of business affairs. . . . Companies must be able to make closing and consolidation decisions of the magnitude presented here"); *General Motors Corp. (GMC Truck & Coach Div.)*, 191 N.L.R.B. 951, 952 (1971) (transfer of operations declared lawful under § 8(a)(5) based on conclusion that "decisions such as this, in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of an enterprise, are matters essentially financial and managerial in nature").

[32] NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3).

[33] 380 U.S. 263 (1965).

union members at the location being shut down, notwithstanding the fact that nonunion plants remain in operation.[34]

In *Dorsey Trailers, Inc. v. NLRB*,[35] the employer committed several unfair labor practices in connection with a strike involving a company plant in Pennsylvania (Northumberland). Yet, the court *rejected* claims that the employer violated section 8(a)(3) by shutting down the Pennsylvania plant and then "transferring work" and "deciding to relocate" to a new facility in Georgia (Cartersville).[36] Although Boeing has not implemented any "relocation" or "transfer" of preexisting work, the situation in *Dorsey Trailers* otherwise resembles Boeing's creation of a second 787 assembly line in South Carolina:

- A strike at Dorsey's Pennsylvania plant prompted the company to consider the different facility in Georgia because the Company "needed to fill backlogged orders," including some of the "biggest orders in its history."[37]
- Upon investigation, the Company found that the Georgia location was "tremendous" and for many reasons "better suited its needs. . . ."[38]
- The Georgia location offered "substantial efficiency gains" and cost advantages including incentives offered by the State of Georgia, including tax credits, training assistance and utility cost reductions, among other things.[39]

The court concluded that the employer lawfully decided to place its manufacturing operations in Georgia, notwithstanding the strike involving the Pennsylvania facility:

> Dorsey Trailers made a reasoned business decision that for the long term, the Cartersville plant was a superior facility to the Northumberland plant. Although the strike might have precipitated the search for a new plant, economic reasons drove the company to purchase and retain the Cartersville facility.
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[34] In *Darlington, supra* note 33, the Supreme Court held that an employer had "the absolute right to terminate his entire business for any reason he pleases" even if the employer was "motivated by vindictiveness toward the union." *Id.* at 268, 273-74. The Supreme Court also held that a discriminatory *partial* shutdown, where other facilities remained in operation, would violate section 8(a)(3) only if the evidence proved the employer "was motivated by a purpose to chill unionism *in . . . remaining plants. . . .*" *Id.* at 274-75 (emphasis added). Concerning an alleged motive to "chill unionism" elsewhere, the Supreme Court indicated this must be proven, and it would *not* suffice to argue the discriminatory closing "necessarily had an adverse impact upon unionization in such other plants." *Id.* at 276.

The Supreme Court in *Darlington* indicated the case did not involve a "runaway shop" whereby the company "would *transfer its work* to another plant or open a new plant in another locality *to replace [the] closed plant.*" *Id.* at 272-73 (emphasis added). In the Boeing case, it appears there likewise has been no "transfer" of "work" nor did the South Carolina assembly line "replace" preexisting 787 Dreamliner assembly work in Everett, Washington. *See* subpart (b) below.

[35] 233 F.3d 831 (4th Cir. 2000), *denying enforcement in relevant part*, 327 N.L.R.B. 835 (1999).

[36] 233 F.3d at 839, 840.

[37] *Id.* at 840.

[38] *Id.*

[39] *Id.*

> *The decision of where to locate a business is fundamentally a managerial decision. Companies must account for the costs of operating a facility as well as the benefits of working in a particular place. . . .* In this case, the company made its decision to relocate its plant for a variety of economic reasons. Although Dorsey Trailers violated the Act in the ways we have recounted, it did not do so by relocating its plant to a more favorable business environment.[40]

Using the label "capital investment" does not give employers a blanket exemption from the NLRA. However, the cases indicate that capital investment is important and requires very careful treatment. And in the Boeing litigation, it is clear that "capital investment" is more than a label: Boeing's placement of a second 787 Dreamliner production line in South Carolina has involved a financial commitment of more than $750 million with more than 1,000 existing employees and more to be hired in the future. This obviously involves a substantial commitment of capital and decision-making that is fundamental to Boeing's business.

(b) Section 8(a)(3) Does Not Prohibit New Investment Decisions, Without a "Relocation," "Transfer" or "Removal" of Work

If an employer engages in a discriminatory "transfer," "relocation" or "removal" of work from a facility, based on antiunion hostility, this can violate NLRA section 8(a)(3), which makes it unlawful for an employer "to . . . discourage membership in any labor organization" by engaging in "discrimination *in regard to hire or tenure of employment* or *any term or condition of employment. . . .*"[41]

The Board Complaint against Boeing focuses primarily on a discriminatory alleged "transfer" of the Company's "second 787 Dreamliner production line" (and a related "sourcing supply program") to Boeing's new facility in South Carolina.[42] However, placement of the new production line in South Carolina has not involved any "relocation," "transfer" or "removal" of preexisting work or equipment from Boeing's IAM facilities in Puget Sound, nor have IAM-represented employees experienced any other adverse impact.[43]

The cases indicate that – without some type of *other* tangible employment action – decisions regarding whether and where to make major capital investment decisions are *not* considered a "term or condition of employment" for purposes of section 8(a)(3) and section 8(a)(5).[44] In the Supreme Court *Darlington* decision, the Court held that even a discriminatory *shutdown* of a unionized facility was lawful under section 8(a)(3) – when other employer facilities remained open – in part because such a decision involved what were deemed

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[40] *Id.* at 841, 845 (emphasis added).

[41] 29 U.S.C. § 158(a)(3) (emphasis added).

[42] Complaint ¶¶ 7, 8.

[43] After the initial NLRB charge was filed against Boeing, Regional Director Richard Ahearn reportedly stated to the Seattle Times that "it would have been an easier case for the union to argue if Boeing had moved existing work from Everett, rather than placing new work in Charleston." *See* "Machinists File Unfair Labor Charge Against Boeing Over Charleston," Seattle Times, June 4, 2010.

[44] *See* subpart (a) above.

"peculiarly matters of management prerogative."[45] The *Darlington* Court also indicated that the case did not involve a "runaway shop," which the Court defined as a situation where the employer "would *transfer its work* to another plant or open a new plant in another locality *to replace [the] closed plant*."[46]

The cases indicate that investment in a new facility can be unlawful only if there is some tangible "runaway shop" defined as (i) a physical "relocation" of equipment, or (ii) an identifiable "transfer" of production that is removed from point "A" and placed in point "B."[47] Boeing's investment in South Carolina has not involved this type of physical relocation or transfer-and-removal of work away from the Puget Sound bargaining unit.

(c) Employers Can Lawfully Consider Higher Costs and Improved Bargaining Leverage, and Communicate Their Lawful Reasons for Investment Decisions

The NLRB Complaint against Boeing alleges that various Company representatives made statements suggesting the Company was penalizing Puget Sound employees – based on past or future strikes – by creating the new 787 Dreamliner assembly plant in South Carolina.[48]

Existing law establishes several principles concerning the types of statements that have been attributed to Boeing representatives.

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[45] *Darlington, supra* note 33, 380 U.S. at 268-69. The Court held that the discriminatory partial closing involved "peculiarly matters of management prerogative" to a degree that rendered inapplicable § 8(a)(1) unless the evidence established unlawful motivation sufficient to establish a violation of § 8(a)(3). *Id.*

[46] *Id.* at 272-73 (emphasis added).

[47] *See, e.g., Darlington, supra* note 33, 380 U.S. at 268-69 (NLRA § 8(a)(3) prohibits a "runaway shop" if the employer who shuts down a union plant "would transfer its work to another plant or open a new plant in another locality to replace [the] closed plant"); *Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 491 (11th Cir. 1982) (§ 8(a)(3) applies when employer "transfers work from the closed facility to another plant or opens a new plant to replace the closed plant"; "[i]f no transfer of work has taken place . . . then there has been no unfair labor practice") (citations omitted); *Frito-Lay, Inc. v. NLRB*, 585 F.2d 62, 67-68 (3d Cir. 1978) (no violation of § 8(a)(3) where "the record indicates that instead of a transfer of work . . . the closing . . . represented an elimination of production"); *Garwin Corp.*, 153 N.L.R.B. 664 (1965), *enforced in part sub nom. Local 57, ILGWU v. NLRB*, 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 942 (1967) ("It is unlawful for an employer to close down a plant in one locality and move it to another in order to deprive his employees of their statutory rights"); *Kaumagraph Corp.*, 316 N.L.R.B. 793, 801-802 (1995) (ALJ opinion) (no violation of § 8(a)(3) based on nondiscriminatory reason for union facility's "closure and relocation" notwithstanding union recognition shortly before these changes); *Seminole Intermodal Transp., Inc.*, 312 N.L.R.B. 236, 238-39 (1993) (violation of § 8(a)(3) where employer "permanently closed its Columbus terminal . . . and relocated all its Columbus trucking work to Springfield"); *Vico Prods. Co.*, 336 N.L.R.B. 583, 587-89 (2001) (violation of § 8(a)(3) based on decision to "relocate" operation and "to layoff the 33 unit employees"); *Langston Cos., Inc.*, 304 N.L.R.B. 1022 n.2 (1991) (employer did not violate § 8(a)(3) "by transferring the half-bag manufacturing operation from its Arlington plant to its Memphis plant"). *See also* Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 Tex. L. Rev. 921, 943 n.80 (1993), *citing FMC Corp.*, 290 N.L.R.B. 483, 487 (1988) ("I have been unable to locate any decisions holding that a withholding of capital investment from a union plant, or a decision not to place new or expanded operations at the plant, was discriminatory under § 8(a)(3). It appears to be necessary under Board law to show that existing unit work was eliminated, subcontracted, or relocated.").

[48] Complaint ¶¶ 6(a) to (e). *See, e.g.*, alleged statements quoted in the text accompanying note 25, *supra*.

First, employers have a protected right under the NLRA to make changes calculated to give the employer greater leverage in future rounds of bargaining with the union.[49] The NLRB itself argued in *American Ship Building Co. v. NLRB*[50] that an employer's "weapons to counterbalance the employees' power of strike" included "economic self-help" measures and the right to "maintain his commercial operations while the strikers bear the economic brunt of the work stoppage."[51]

Second, the NLRA permits employers to make business changes – including "relocation" or "work transfer" decisions – based on economic costs the employer has experienced because of union representation.[52] And under the NLRB "mixed motive" test, a "relocation" will be lawful, even if the employer has hostility towards a union, if economic considerations would have prompted the employer to make the same decision without regard to antiunion sentiments.[53]

Third, it is permissible for employers to *communicate* to employees and Union representatives the economic reasons that are responsible for important business changes.[54]

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[49] Inherent in any strike are union efforts to inflict economic damage on the employer, and these efforts are generally protected under the NLRA. *See NLRB v. Insur. Agents' Int'l Union*, 361 U.S. 477, 489 (1960) (the presence and exercise of "economic weapons" are "part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized"). Consequently, employers likewise have a protected right to take action calculated to increase employer leverage in bargaining, to increase the employer's ability to operate during strikes, and to impose pressure on the union. *See American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965) (employer lawfully implemented lockout to impose pressure on union and to avoid risk of strike during busy season); *NLRB v. Brown*, 380 U.S. 278 (1965) (employer lawfully implemented lockout and continued operations using temporary replacements); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) (employer faced with economic strike may permanently replace striking employees).

[50] 380 U.S. 300 (1965).

[51] *Id.* at 316 (emphasis added).

[52] The leading § 8(a)(5) relocation case *presumes* that many lawful relocations occur *because of* labor costs or other things for which the union is responsible. *See Dubuque Packing Co.*, 303 N.L.R.B. 386, 391 (1991), *enforced in relevant part sub nom. UFCW Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), *cert. granted*, 511 U.S. 1016 (1994), *cert. dismissed*, 511 U.S. 1138 (1994) (bargaining required over relocation decisions where, in part, "labor costs were a factor in the decision" and the union could have "offered labor cost concessions that could have changed the employer's decision to relocate"). *See also Langston Cos., Inc., supra* note 47 (employer did not violate § 8(a)(3) even though transfer from union to nonunion facility occurred after successful union organizing drive).

[53] *See, e.g., Litton Mellonics Sys. Div.*, 258 N.L.R.B. 623 (1981), *enforced*, 738 F.2d 447 (9th Cir. 1984); *Dorsey Trailers, Inc. v. NLRB, supra* note 35; *Langston Cos., Inc., supra* note 52. *See generally Wright Line, Inc.*, 251 N.L.R.B. 1083, 1086 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[54] Section 8(c) of the Act broadly protects employer speech regarding union-related issues if there is no threat of reprisal or force or promise of benefit. 29 U.S.C. § 158(c). *See also Oxford Pickles*, 190 N.L.R.B. 109, 111 (1971) (Member Brown, dissenting) (employer lawfully stated that plant's survival could be "seriously hurt by a union" and that employer "would have every legal right to move the business" if a union "put us in a position of not being able to compete"); NLRB *v. Gibraltar Industries, Inc.*, 653 F.2d 1091, 1095 (6th Cir. 1981) (employer comments regarding effect of negotiation stalemate and possible strike reflected lawful "attitude" of "a rational businessman concerned about minimizing costs, a particularly relevant concern for a business . . . involved in government contracts"); *National Terminal Baking Corp.*, 190 N.L.R.B. 465, 466 (1971) (employer statements about losing money and possible closing reflected "overwhelming economic need for shutting down then and there"). *See generally NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Finally, the alleged statements described in the NLRB complaint against Boeing (some of which Boeing has denied)[55] generally reflect a sentiment that would hardly be surprising to anyone: when a company makes a major decision about new investment, the company is interested in maximizing its return and minimizing instability and downtime.[56]

The Act protects employees from unlawful strike-related retaliation, but it does not give employees immunity from a strike's economic consequences. Especially in the circumstances of Boeing's 58-day strike in 2008 – when the 787 Dreamliner production already was 15 months behind schedule and when the strike itself cost Boeing 105 fewer aircraft deliveries and $1.8 billion in lost revenues[57] – it could not have been a revelation to IAM employees that strike-related costs and disruption might be considered when the Company was deciding what *new* investment was appropriate and where it should be made.[58]

The Supreme Court in *Darlington* indicated it was *permissible* for an employer to announce "a decision to close already reached by the board of directors or other management authority empowered to make such a decision," which the Court distinguished from the type of "threatening to close his plant" that could violate section 8(a)(1) of the Act.[59] Consequently, in the litigation against Boeing:

- The South Carolina investment decision announced by Boeing falls literally within what Darlington permits – i.e., "a decision . . . reached by the board of directors or other management authority empowered to make such a decision."[60]
- Even if the alleged statements by Boeing representatives are considered independent violations of section 8(a)(1), this would not support the remedy being sought, which

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[55] *See* note 24, *supra*.

[56] It is most ironic that the Board's General Counsel in the Boeing litigation is attempting to protect employees under NLRA § 8(a)(1) from alleged "interference," "coercion" and "restraint" associated with fairly self-evident statements about strike-related costs and risks (*e.g.*, the impact of business instability and costs on future investment decisions), when the Board has recently held it does not constitute "coercion" of neutral employers under NLRA § 8(b)(4)(B) for employees to display large banners (3 or 4 feet high and from 15 to 20 feet long) or a similarly oversized inflatable "rat" in front of the neutral businesses. *See, e.g., Sheet Metal Workers Int'l Ass'n, Local 15 (Brandon Regional Medical Center)*, 356 N.L.R.B. No. 162 (May 26, 2011); *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 N.L.R.B. No. 159 (Aug. 27, 2010). In both of these cases there were dissenting opinions by Members Schaumber and/or Hayes.

[57] Luttig Statement, p. 4.

[58] Contemporaneous news articles described the economic costs resulting from the 2008 work stoppage in terms that would make it irresponsible for any management representative not to take such costs into account when making new or additional investment decisions. *See, e.g.*, "Boeing Strike, 787 Delays Hurting Titanium Producers," Reuters, Sept. 29, 2008 ("'The Boeing strike raises risk of further 787 schedule slips and related titanium demand and price softness through 2010,' Cowen and Co analyst Gautam Khanna wrote in a research note on Monday"); "Boeing Says Strike Might Delay 787 Test Flight," Industry Week, Oct. 1, 2008 ("Boeing has staked its future on the Dreamliner. . . . Any further delays in the schedule would damage Boeing's reputation and risk antagonizing clients"); "Boeing Posts Big Loss in 4th Quarter," Seattle Post Intelligencer, Jan. 28, 2009 (stating Boeing's financial results "show the deep impact of the two-month long Machinists strike" and "a 787 customer . . . canceled its entire order for 15 planes").

[59] *Darlington, supra* note 33 380 U.S. at 274 n.20.

[60] *Id.*

is a requirement that Boeing "operate its second line of 787 Dreamliner aircraft assembly production in the State of Washington."[61]

(d) *South Carolina Employee Interests Warrant Consideration and Protection*

Another relevant legal principle concerning Section 7 of the Act involves its protection of *all* employees without regard to whether or not they are represented by a union, and whether they participate or refrain from engaging in collective bargaining and other concerted activities.[62] Therefore, in cases involving multiple work locations and two or more groups of employees, the interests of *both* employee groups warrant consideration and protection.[63]

In one of the Board's leading section 8(a)(3) "relocation" cases – *Garwin Corp.*[64] – the employers violated the Act "by closing their New York facility, discharging their employees, and removing their operations to Miami, Florida, . . . to avoid dealing with the Union,"[65] which the Board described as "the traditional runaway-shop situation."[66]

Even though the employer in *Garwin* engaged in a "relocation" that was based on hostility towards the union, the court of appeals rejected the Board's order which sought to impose union representation on Florida employees. The court stated: "We find it difficult to see genuine meaning in a 'remedy' which is essentially negative in character and smacks of punitive action."[67] The court concluded:

> The right to choose a union and have that union operate in a climate free of coercion, which is the goal of Board compulsory bargaining orders, is a cornerstone of the National Labor Relations Act; *equally protected by the Act with the right of the workers to choose that representative is the right to have none.*
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[61] Complaint ¶ 13(a). *See* the "outcome" discussion in subpart 3 below.

[62] Section 7 of the Act provides: "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities." 29 U.S.C. § 157.

[63] For example, in "accretion" disputes – where a union attempts to become the representative of employees at a different location without an election – the Board typically will not "compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election."*Melbet Jewelry Co.*, 180 N.L.R.B. 107, 110 (1969). *See also Gitano Group, Inc.*, 308 N.L.R.B. 1172, 1174 (1992). Likewise, if a collective bargaining agreement's "after-acquired" clause purports to make the agreement applicable to employeees at a newly purchased facility, the Board has held the clause will not be enforced absent a showing that the union has majority support among the new facility's employees. *See, e.g., Kroger Co.*, 219 N.L.R.B. 388 (1975).

[64] 153 N.L.R.B. 664 (1965), *enforced in part sub nom. Local 57, ILGWU v. NLRB*, 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 942 (1967).

[65] 153 N.L.R.B. at 664-65.

[66] *Id.* at 665 n.2.

[67] 374 F.2d at 300.

> In our view *the Board should not seek to "discipline" the Employer at the expense of the new Florida employees. Such a remedy is, on its face, arbitrary; the Board ought not rob Peter to punish Paul.*[68]

3. Outcome: The "Take it Back, Put it Back" Remedy

In NLRB cases challenging major business changes, the General Counsel can seek an exceptionally onerous penalty: an order requiring employers responsible for an unlawful "relocation" to undo major decisions many years after-the-fact, to move work to a different location, and to hire or reinstate dozens or hundreds of employees with years of backpay and benefits. This "take-it-back, put-it-back" remedy is being sought in the current NLRB proceedings against Boeing.

The absence of a bona fide "relocation," "transfer" or "removal" of work from Boeing's Puget Sound facilities raises fundamental problems with the "take it back, put it back" remedy being sought by the General Counsel,[69] as would the extraordinary hardship and costs associated with imposing the "take it back, put it back" remedy following years of litigation.[70]

It bears emphasis that the remedy being sought against Boeing (a requirement that the second 787 assembly line be operated in the State of Washington) involves what is uniformly described as the Board's authority to order restoration of the "*status quo ante*,"[71] which means "the situation that existed before."[72] Of course, an order requiring Boeing to place a second 787

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[68] *Id.* at 301-304 (emphasis added; footnotes and citations omitted).

[69] Subject to a variety of qualifications (see note 70, *infra*), the Board's "take it back, put it back" remedy (requiring restoration of the *status quo ante*) can be imposed in "relocation" cases where the employer is found to have viiolated § 8(a)(3). *See, e.g., American Needle & Novelty Co.*, 206 N.L.R.B. 534 (1973); *Seminole Intermodal Transport*, 312 N.L.R.B. 236 (1993), *enforced without opinion*, 50 F.3d 10 (6th Cir. 1995). However, if one excludes the § 8(a)(3) relocation/transfer allegation asserted against Boeing, statements like those attributed to Boeing representatives would normally be evaluated under § 8(a)(1), and the typical Board remedy would be an order requiring the employer to "cease and desist" from violations of § 8(a)(1), the posting of a notice, and possibly a "rerun" election or bargaining order (if the statements were deemed to have interfered with a representation election in which the union lost). *See, e.g., Upper Great Lakes Pilots, Inc.*, 311 N.L.R.B. 131 (1993); *Almet Inc.*, 305 N.L.R.B. 626 (1991); *Imperial Machine Corp.*, 121 N.L.R.B. 621 (1958).

[70] In § 8(a)(3) and § 8(a)(5) cases, the Board and the courts will not order restoration of the *status quo ante* where this would be financially burdensome and/or where other considerations render such a remedy inappropriate. *See, e.g., Garwin Corp., supra* note 64, 153 N.L.R.B. at 681, where the Board held the employer was not required to restore operations at the former location, and stated: "the Board considers such questions as the extent to which the employer divested himself of his assets and machinery, whether he permanently discontinued or merely subcontracted his operations, whether he operates a related plant and, if so, the geographical distance of that plant from the old one, and the feasibility of and hardship entailed in requiring resumption of operations." *See also Dorsey Trailers, Inc. v. NLRB, supra* note 35; *Lear Siegler, Inc.*, 295 N.L.R.B. 857 (1989) ("financially burdensome" standard); *Special Mine Serv.*, 308 N.L.R.B. 711 (1992), *enforcement denied in part*, 11 F.3d 88 (7th Cir. 1993) (court finds NLRB restoration order inappropriate); *Townhouse TV & Appliances*, 213 N.L.R.B. 716 (1974), *enforcement denied in part*, 531 F.2d 826 (7th Cir. 1976) (restoration order deemed too "financially burdensome"); *National Terminal Baking Corp.*, 190 N.L.R.B. 465 (1971) (compelling economic circumstances).

[71] *See* cases described in notes 69 and 70, *supra*.

[72] *United States v. Matthews*, 395 F.3d 477, 480 (4th Cir. 2005), *quoting* BLACK'S LAW DICTIONARY 1448 (8th ed. 2004).

assembly line in Washington State would bear no resemblance to what "existed before," since that second assembly line constitutes new work that had not previously been done anywhere.[73]

Conclusion

The NLRB is charged with the "difficult and delicate responsibility" of administering the NLRA.[74] I have dealt with the Board for nearly 30 years. I greatly respect the Members of the Board, the Acting General Counsel, and others employed in the agency. Their work is not easy and it is fraught with controversy.[75]

It would benefit everyone if some meaningful adjustment in the factors I have mentioned – process, substance, and the remedy being sought – accomplished a resolution of the Boeing dispute. There is also room for progress on other fronts. It would help to have clearer and more uniform legal standards,[76] and there should be a harder look at the process built into the Act for resolving these disputes. Major business changes and investment opportunities are non-partisan events, and their consequences do not differentiate on the basis of political party.

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[73] If Boeing's actions are lawful, the Board has no authority to impose any remedial measures. *See Preston Feed Corp.*,309 F.2d 346, 352 (4th Cir. 1962) ("the Board is without power to interfere with management where the discontinuance of a part of the business is prompted by legitimate business motives and not in order to frustrate the purposes of the Act or interfere with employees in the exercise of the rights conferred upon them by the statute").

[74] *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 499 (1960), *quoting NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957). In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963), the Court stated "we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life" (citation omitted). *See also NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 496-97 (1985); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1978); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

[75] I have written that the NLRB and the courts have an unenviable responsibility under the Act, which becomes even more daunting when variations in the law result from periodic changes in the Board's composition. MANAGERIAL DISCRETION, 2d ed. at 569.

Unfortunately, not much has changed since Professor Summers made the following observation about the NLRB more than 50 years ago: "The labor lawyer's world is not a secure one, for [the lawyer] walks on a thin crust of precedents. The body of Board decisions in many areas often gives an appearance of firmness only to have tremors beneath the surface open unexpected fissures or raise new ranges of decisions. In our primitiveness we may see these faults and upheavals in the crust of precedents as acts of God or Satan, crediting angels or devils incarnate in the bodies of Board members. With the appointment of new members the warning rumblings become more noticeable, and we spur our efforts to seek out the spirits and identify them as good or evil." C. Summers, *Politics, Policy Making, and the NLRB*, 6 Syracuse L. Rev. 93 (1955). No side has a monopoly on pleas for more stability and fewer changes at the Board. *See, e.g.*, L. Bierman, *Reflections on the Problem of Labor Board Instability*, 62 Denv. U. L. Rev. 551 (1985); Cooke & Gautschi, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 Indus. & Lab. Rel. Rev. 539 (1982); Dunau, *The Role of Criticism in the Work of the National Labor Relations Board*, 16 N.Y.U. Conf. Lab. 205 (1963). *Cf.* Hickey, *Stare Decisis and the NLRB*, 17 Lab. L.J. 451 (1966).

[76] A longstanding challenge in NLRB cases involving major business changes has been the existence of multiple different legal standards, the application of which depends on the label used to describe the employer's actions. In this respect, "most Board and court cases presume a world where complex restructuring decisions can be reduced to a one- or two-word label, which in turn dictates how a roulette wheel of different legal standards translates into the rights and obligations deemed applicable in a given situation." MANAGERIAL DISCRETION, 2d ed. at 565.

I will close today by mentioning NLRB litigation challenging a "relocation" that was announced on June 10. Except this "relocation" was announced 30 years ago on June 10, 1981.[77] Like the Boeing case, this other "relocation" was the subject of a Board complaint. There was an ALJ hearing, an NLRB decision, and court appeals. And it took *13 years* before the litigation finally ended in this case, which was called *Dubuque Packing Co.*[78]

When this other "relocation" dispute was being considered by the Court of Appeals for the D.C. Circuit, the court stated:

> *This case presents hard questions – indeed, some of the most polarizing questions in contemporary labor law.* While we are sympathetic to the task that lies ahead for the National Labor Relations Board, *our sympathy does not lead us to shirk our duty to hold the Board accountable for the rationality of its decisions.*[79]

This concludes my prepared testimony. I have provided an extended version of my remarks for the record. I look forward to any questions Members of the Committee may have. Thank you for the invitation to appear today.

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[77] *Dubuque Packing Co.*, 287 N.L.R.B. 499, 510-11 (1987) (ALJ opinion), *remanded sub nom. UFCW Local 150-A v. NLRB*, 880 F.2d 1422 (D.C. Cir. 1989), *on remand*, 303 N.L.R.B. 386, 390 n.8 (1991), *enforced in relevant part sub nom. UFCW Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), *cert. granted*, 511 U.S. 1016 (1994), *cert. dismissed*, 511 U.S. 1138 (1994).

[78] *Id.*

[79] *UFCW Local 150-A v. NLRB*, 880 F.2d 1422 (D.C. Cir. 1989).

Chairman ISSA. Thank you.
Professor.

STATEMENT OF JULIUS GETMAN

Mr. GETMAN. Thank you.

And like all of those who preceded me, I thank the committee for the opportunity to speak to it.

Chairman ISSA. Thank you. And it is a large lecture hall. So the louder you speak, the better.

Mr. GETMAN. Thank you. I will take advantage of that.

When I agreed to speak to this committee, I started reading up on the Boeing case more than I had previously. And in my reading, I was struck by the fact that there was an enormous amount of statements made about the case, many of it by political figures and many of it by political commentators and some by law professors, many of whom I knew.

Now what was striking to me was the difference in tone between the comments of the political figures and the political commentators and those of the law professors. The political commentators saw in this case something unparalleled, dangerous, very powerful, threatening essentially the capitalist system and the ability of employers to transfer work from one facility to another. And they kept attributing this to the NLRB.

The law professors saw this as a fairly routine Section 8(a)(3) charge by the labor board, and I want to identify myself with my fellow law professors. This is not in any way an earth-shaking case. This is a traditional case being decided, and which should be decided in accordance with principles of law that are over 50 years old.

It is well settled, and my colleague to my right does not disagree, that a company may not transfer work for retaliatory reasons. Of that, there is a statement to that effect by Judge—which I quote in my testimony—by Judge, later Chief Justice Burger. This is in 1967.

"While it is now clear that an employer may terminate his business for any reason, it is equally well settled that he may not transfer its situs to deprive his employees of rights protected by Section 7."

Now the general counsel alleges that Boeing has taken the steps that it has taken in transferring work from Washington to South Carolina to retaliate against the workers for their activity, for their union activity in Washington. Now Section 8(a)(3) of the act, its general purpose has been stated by Justice Frankfurter is "to insulate the rights of workers to engage in union activities from their job rights."

Which means that you may not retaliate against workers or in any way punish them for engaging in union activity. The general counsel alleges that that is precisely what Boeing has done.

I have read his complaint, and it is filled with quotes from Boeing officials basically acknowledging that that's what they've done. To me, the most unusual thing about this matter is that Boeing has—that officials of Boeing have confessed on numerous occasions to having violated the law. And the general counsel has cited this.

It is also the case that the remedy that he seeks is not at all draconian. In fact, he's gone out of his way to state that—and I'm quoting from the complaint—"The acting general counsel does not seek to prohibit respondent from making nondiscriminatory decisions with respect to where work will be performed, including nondiscriminatory decisions with respect to work at its North Charleston, South Carolina, facility."

So that while the matter proceeds, there is no doubt that Boeing continues to have the right to transfer work to South Carolina. And so long as it's doing so on a legitimate business and not a retaliatory basis. And it is for that reason that the case seems to us, to most of us law professors—myself, Professor Brudney and others—it seems to us a traditional Section 8(a)(3) case.

Now there is another—and so, we wonder why, in light of the fact that the board is doing nothing unusual or the general counsel is doing nothing unusual, why is it that there needs to be a hearing by the Oversight Committee? There is an additional reason for our concern, and that is process, which has been referred to by several of the committee members.

As I point out in my testimony, the NLRB has not decided this case. The general counsel, who is essentially a prosecutor, has discovered enough evidence to proceed. He seems in the——

Chairman ISSA. We will get to that, if you can wrap up, please?

Mr. GETMAN. Well, all right. I just want to make this point, which I think is important. That there are—if Boeing is correct and if the general is correct, there are a whole bunch of legal processes, and these are the processes that are established by law to correct it.

We have all of the hearings still pending before the administrative law judge, the labor board itself, and finally, in the courts. And it's important to note that Boeing has to take no action until it's ordered to do so by the court.

[The prepared statement of Mr. Getman follows:]

Testimony of Professor Julius Getman
Earl E. Sheffield Regents Chair of Labor Law
at the University of Texas School of Law
Before the House of Representatives Oversight Committee Hearing
Charleston, South Carolina Friday June 17, 2011

I am Julius Getman, Earl E. Sheffield Regents Chair of Law at the University of Texas at Austin. I have taught labor law since 1963. Prior to coming to Texas I was a tenured professor at Indiana University School of Law, Stanford University School of Law, and Yale Law School. I have written extensively on issues of labor law. I am the co-author of a widely used treatise on basic labor law and was co-principal investigator of a major study of union organizing campaigns. Most recently, I have published *Restoring the Power of Unions: It Takes a Movement*, which tells the history of the hotel and restaurant workers union and discusses the current law. I appreciate the opportunity which the committee's invitation provides me to express my opinion on important issues of labor law and policy.

The General Counsel's complaint alleges that Boeing has transferred work, which would otherwise have been done at its Washington state facility, to South Carolina in reprisal for past strikes, and with the avowed purpose of heading off future strikes. If the General Counsel can establish the truth of this allegation, and public statements by Boeing officials seem to acknowledge its accuracy,[1] he will have shown that Boeing violated Section 8 (a) (3) of the NLRA. There is nothing new or controversial about this conclusion. Section 8(a) (3) of the National Labor Relations Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term of condition of employment

[1] A list of statements attributing the move of "dreamliner" work to South Carolina to union activity is contained the General Counsel's complaint.

to encourage or discourage membership in any labor organization."[2] The purpose of this section is "to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood."[3] In accord with this policy, the Court has held that to "encourage of discourage membership" means also to encourage or discourage participation in union activities.[4]

Moving jobs from once facility to another to avoid unionization or to punish workers for engaging in protected activity violates this basic policy of the Act. These practices have long been declared illegal by the Board, with the agreement of the Courts.

In 1965, the Supreme Court decided in the case of *Textile Workers Union v. Darlington Manufacturing Co.*[5], that a company may legally go out of business to thwart union activity, but it also held that "[a] partial closing is an unfair labor practice ... if motivated by a purpose to chill unionism."

Two years later, then Judge, later Chief Justice Burger stated in *Local 57, International Ladies' Garment Workers' Union v. National Labor Relations Board, 1967*,[6] "While it is now clear that an employer may terminate his business for any reason, it is equally well settled that he may not transfer its situs to deprive his employees of rights protected by Section 7."[7] Not only have the Courts regularly affirmed unfair labor practice findings based on retaliation, but they

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[2] 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(2)(3) (1958).

[3] Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954).

[4] *Id.* At 39-42.

[5] 380 U.S. 263.

[6] 374 F2d 295.

[7] It has been understood since the NLRA was passed in 1937 that the right to strike is protected by Section 7.

have upheld strong remedies including the restoration of improperly closed facilities.[8] Accordingly I am in agreement with the host of distinguished labor law scholars who have publically supported the General Counsel's conclusion that issuance of a complaint was justified in the Boeing case.[9]

Despite a spate of angry statements to the contrary, there is no basis for the accusation that the issuance of a complaint is in any way connected to the fact that South Carolina is a right to work state. Right to work is a frequently misunderstood concept. Despite the name it has nothing to do with the employer's ability to hire or fire. Nor does it refer to the right to unionize. It refers only to the ability of states to prohibit unions from negotiating mandatory dues payments from workers that they represent. Had Boeing transferred operations on the same basis to a non-union facility in a non-right to work state, its actions would still have violated the Act. This same well-established precedent supports the general counsel in the instant case.

Given the routine nature of the violation and the limited nature of the proposed remedy (discussed below), it is difficult for me to understand the sense of outrage that has preceded and given rise to this hearing. The Board has routinely found violations of section 8 (a) (3) based on employer reprisal for union activity since the Act was first passed in 1935. I know of no case in which a political reaction comparable to the current denunciations of the General Counsel's action has resulted. One wonders why the issuance of a complaint, a preliminary step far less final than a Board decision, should be responded to so intensely. Behind the fervent denunciations there seems to be a deep misunderstanding of the likely consequences of the General Counsel's actions. Some seem to find, in the General Counsel's actions, the first step of

[8] See e.g. Teamsters Local 17 v. NLRB, 803 F 2d 946 (D.C. Cir 1988).

[9] The list includes Professors James Brudney of Ohio State, Catherine Fisk of Cal Irvine, and Ellen Dannin of Penn State. These are all outstanding, nationally recognized scholars.

a process to take from employers the right to make basic business decisions. In fact the complaint itself specifically states that aside from returning the work improperly removed from the unionized workers, "the Acting General Counsel does not seek to prohibit Respondent from making non-discriminatory decisions with respect to where work will be performed, including non-discriminatory decisions with respect to work at its North Charleston, South Carolina, facility."

Nor has this, or any other Labor Board, ever argued for or signaled support for, a policy depriving employers of the right to make basic entrepreneurial non-discriminatory decisions. And if the Board were to overreact in this regard, the Courts are available to correct their excesses.

The National Labor Relations Board, the agency to which Congress has delegated the process of interpreting the NLRA, has not yet ruled on the case. Even if the General Counsel's theory of violation were somehow erroneous, there would be no basis for Congressional involvement in the decision process at this point. The NLRB is an agency with two separate arms: the General Counsel who prosecutes possible unfair labor practices and the five-member Board which rules on them. There has been no ruling by the Board itself on the Boeing case.

The two branches of the Board act independently of each other. The five-member Board according to statute and precedent played no part in the decision by the General Counsel to bring a complaint. And the General Counsel does not play a role other than that of advocate in the Board's decisional process. Before the Board itself issues any order, the case must be heard and decided by an Administrative Law Judge and then by the Board itself. The Board should be permitted to decide this case according to the law without political interference. As Justice

Frankfurter stated over 50 years ago with respect to the reach of sections 7 and 8, "It is essential that these determinations be left in the first instance to the National Labor Relations Board."[10]

The complaint is simply an allegation; it does not require Boeing to take any action. Indeed the same would be true if the Board ultimately decides against Boeing. Boeing may bring the matter to a Court of Appeals without taking any of the steps contained in the Board's order, or it may simply wait for the Board to do so in an enforcement action, before complying. Not until the Board's order is enforced by a Court of Appeals would Boeing be legally compelled to take action in accordance with the Board's ruling. And if all of the adjudicatory agencies, yet to rule on the case, agree with the Acting General Counsel, the impact on Boeing will not be catastrophic since the General Counsel is not seeking to have Boeing give up its South Carolina facility and agrees that it may transfer work to it, so long as its decision to do so is made on a non-discriminatory basis. In short, there is no reason for the sense of urgency that has provoked these hearings.

What is unprecedented is a committee of the Congress choosing to intervene while the processes of law are still in so preliminary a state. I know of no similar instance. It is inevitable that this intervention will be interpreted by many as an unwarranted attack on the NLRB and an inappropriate effort to influence the ongoing adjudicatory process.

[10] San Diego Building Trades Council v. Garmon, 359 U.S. 23 (1959).

Chairman ISSA. I thank the gentleman.

I will now recognize myself for the first round of questioning.

Mr. Getman, Professor, since you were so eloquent in your explanation, I have a question for you that maybe is just because I wasn't a student ever in your class. Is there a right under the National Labor Relations Act to guarantee that you have new employees junior to you?

Okay. Mr. Solomon, are you discriminated against if you don't become more senior, if there are not new employees underneath you in seniority? Is that a discrimination? In other words, not hiring new people, is that a discrimination against the existing individuals that are working?

Mr. SOLOMON. I don't——

Chairman ISSA. If no people lose their jobs, if 100 percent of the people continue to get the same pay and benefits in Everett, Washington, then are they discriminated by not having additional fellow Seattle residents get jobs?

Mr. SOLOMON. That isn't the theory of our complaint, Mr. Chairman.

Chairman ISSA. I am not talking necessarily about your complaint. There is no cause of action if there is no discrimination. Correct?

You know, you can choose——

Mr. SOLOMON. But there's not a violation of the National Labor Relations Act.

Chairman ISSA. So the choice not to invest in a business-unfriendly environment is, in fact, not protected by the National Labor Relations Act. Is that correct? New investment, new jobs, new decisions. Not protected by the National Labor Relations Act. Correct? In your opinion.

Okay. Let me get to a couple of fairly simple points. You are an acting. You were chosen by the President in 2010. You serve at his pleasure. Is that correct?

Mr. SOLOMON. Correct.

Chairman ISSA. And you will continue to serve at his pleasure until or unless you are confirmed. After that, you could only be removed for cause. Correct?

Mr. SOLOMON. Yes.

Chairman ISSA. So, oddly enough, somebody who totally is dependent upon the continued best wishes of President Obama is who brought this case. Just an oddity that you have been so long since 2010, and you haven't been confirmed?

Mr. SOLOMON. The—the White House had no involvement in my decisionmaking process.

Chairman ISSA. I didn't ask that, but thank you for offering. [Laughter.]

And the NLRB itself has four Obama appointees and one vacancy, and one of those appointees is a recess appointment, meaning not confirmed. Is that correct?

Mr. SOLOMON. That is correct.

Chairman ISSA. So the term "independent," you are currently no more independent than Janet Napolitano or any of the other political appointees of the President?

Mr. SOLOMON. I would respectfully disagree with you over that.

Chairman ISSA. I mean, from a standpoint of you serve at the pleasure of the President, right?

Mr. SOLOMON. Yes.

Chairman ISSA. Okay. One of the questions I am trying to understand, and I think I will go to Chicago for a moment, Mr.—and I keep, I have a tough time with your name—Miscimarra.

Mr. MISCIMARRA. Miscimarra, Mr. Chairman.

Chairman ISSA. Miscimarra? Okay. Much better when I hear it. Must be a South Carolinian thing. [Laughter.]

VOICE. Very much a South Carolina name.

Chairman ISSA. Your opinion is different. But let me just ask, because Professor Getman was kind enough to say that this was so ordinary and routine and common, is there anything common about an expanding opportunity, new jobs, and some of those new jobs—3,000 or so of them are going to Everett, Washington, and 1,000 are coming here? Is there anything unusual about the triggering—notwithstanding what is in the hearts and minds of executives or even the conversations of executives, is there anything unusual in a case being brought claiming that it is retaliatory to be only giving three out of four jobs to the people that you are supposedly retaliating against?

Mr. MISCIMARRA. I mean, that's one of the things that's unusual, Mr. Chairman, about this case, in my opinion. You know, there are two things.

One is, it's very clear, at least in my reading of Section 8(a)(3) cases that deal with discriminatory relocations, that they involve some sort of physical transfer of work and some sort of removal, a tangible removal of work.

You know, I cited approximately 15 cases with quotes in my—the written version of my testimony. And right down the line, the cases all talk about taking work from point A, moving it to point B. As I understand the facts involving the respective facilities that are at South Carolina and Washington State, employment is increasing in both places, and it's unusual in that context, I think unprecedented, to have an 8(a)(3) complaint.

Chairman ISSA. Thank you.

Ms. Ramaker, is there any doubt in your mind if you went and held a vote and voted back in the International Machinists and Aerospace Union and became its president, is there any doubt in your mind that this wouldn't all go away, and you would be just fine as long as you were a union shop?

Ms. RAMAKER. No, and I'm glad you brought that up. Because we've had a problem or issues with IAM out of Everett, Washington, Puget Sound, the whole area, since we opened up even as Vought.

When we were union, there was no support from their union reps. We're union. We're not union. It didn't matter. It seemed to be to us, as a worker, about the total control of this program versus where it is. They wanted it there, period.

Chairman ISSA. Okay. So just a quick follow-up. Your view is that this has nothing to do even with your choice not to be a union shop——

Ms. RAMAKER. Correct.

Chairman ISSA. That this is really about people in Everett, Washington, wanting to have everything in Everett, Washington?

Ms. RAMAKER. Correct.

Chairman ISSA. Thank you.

I go to the gentlelady from New York for her round of questioning.

Mrs. MALONEY. I thank the chairman.

Since the chairman pointed out that Mr. Solomon was appointed by President Obama, I wanted to also point out that he began his career in the agency as a field examiner in Seattle in 1973, and I understand you have worked for a number of Presidents and a number of board members, both Republican and Democratic.

Could you be described as a career professional, if you would like to clarify?

Mr. SOLOMON. I am—I am a career professional.

Mrs. MALONEY. How many Presidents have you worked for?

Mr. SOLOMON. I have worked specifically or directly with at least 10 board members, some Republican, some Democrats, and then, of course, I have worked indirectly with many, many more.

Mrs. MALONEY. And served under how many Presidents during that tenure with——

Mr. SOLOMON. That's hard for me to do the math. Since however many we've had.

Mrs. MALONEY. But you have served both Republican and Democratic, and you are a professional?

Mr. SOLOMON. Yes, however many we've had since 1972.

VOICE. Since Gerald Ford apparently.

Mrs. MALONEY. Right. I wanted to go back to Professor Getman and give him more time to eloquently describe the points that he was making. And you pointed out that this transfer, that any transfer for legitimate reasons for wanting to go to historic Charleston, whatever the reason, was totally legitimate.

But if you are transferring in retaliation because of the constitutional right that is protected by law, the right to protest, the right to bargain, that that is not acceptable. And as my colleague Mr. Kucinich pointed out in his opening remarks with his direct quotation, Boeing officials, even the top Boeing official has made it very clear that this was an act of retaliation.

And I would like you to clarify more what role does South Carolina's status as a right-to-work State or as a beautiful community or as a wonderful place to visit, what did that play in the complaint issued by the NLRB? And explain the case more that it was really because of the retaliation, which is a protection for all Americans, protection for all workers in any capacity.

So I wanted to give you more time to explain your position.

Mr. GETMAN. Well, thank you for the question.

First, I want to point out that the role of the general counsel is limited. He or she is not supposed to take into account the wonders of South Carolina or the beauty of Washington State either. The role is limited to enforcing the National Labor Relations Act and to enforcing Section 8(a)(3).

And I have been a student of that for close to 50 years. And as I indicated and you properly stated it, the whole point of Section

8(a)(3) is employers can make decisions on any basis that they want. That's no business of the general counsel.

But if they're doing so to punish people because they went on strike, that is a violation of the National Labor Relations Act. Maybe that's not the reason they so acted. That will come out during the process.

I must say the general counsel has cited, or the acting general counsel has cited numerous statements which seem to support the allegation. It does seem to me that if I were the general counsel of the National Labor Relations Board, I would feel compelled to do what he did and issue a complaint.

Mrs. MALONEY. When you talk about strikes, I know a very famous strike came, happened in New York in the district I represent, the Triangle Shirtwaist Factory. After there was a fire, all the doors were locked. Well over 200 women were killed.

And there were strikes saying we should have safe working conditions. And I remember reading about the strikes that said we should not have child labor laws. And people criticized people. "They shouldn't be doing that." Now it is an accepted value in our country.

So, Mr. Solomon, I would just like to ask you, as we are struggling to recover from the great recession, the worst since the Great Depression, do you believe that the enforcement of the NLRA is good for the middle class and good for the values that have helped to build this country? Your comments, please.

Mr. SOLOMON. Oh, certainly, Congresswoman.

The National Labor Relations Act was passed by Congress in 1935, having come out of a greater depression than we have just had. But the Congress was—believed that protecting workers and giving them a voice was good for the economy. And if I may, I would like to read from Section 1 of the National Labor Relations Act that was passed by Congress.

"It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Chairman ISSA. Thank you.

The gentleman, Mr. Gowdy.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. Solomon, I want you to assume that a customer told Boeing that because of work stoppages they were going to find another supplier for airplanes. Can Boeing consider that?

Mr. SOLOMON. I can only decide a case based on the investigation and the facts of that case, and——

Mr. GOWDY. Mr. Solomon, I have a very limited amount of time, and I am sure, prosecutor to prosecutor, you can appreciate the fact that I am going to need a yes or no answer. And then you can explain it, if you want to.

A customer told Boeing that because of work stoppages they were going to find another supplier of airplanes. Can Boeing consider that?

Mr. SOLOMON. A company can consider many things, Congressman.

Mr. GOWDY. Can they consider the fact that they are going to lose customers?

Mr. SOLOMON. I can only tell you what the theory of the complaint is. The facts will come out at the hearing, and I——

Mr. GOWDY. Mr. Solomon, do you agree that it is a fact that there was a work stoppage for 58 days that cost Boeing over $1 billion? Do you agree that that is a fact?

Mr. SOLOMON. Yes, I do. Yes.

Mr. GOWDY. Do you agree that Mr. Branson said these work stoppages are unacceptable, and if they continue, we will find another supplier of our airplanes? Do you dispute that that statement was made?

Mr. SOLOMON. I—I just do not want to talk about evidence that's going to be introduced into the record.

Mr. GOWDY. Mr. Solomon, it has been in the newspaper. There is nothing confidential about that. Do you dispute that Mr. Branson, a customer of Boeing's, said if the work stoppages continue, we will find another supplier of our airplanes?

Mr. SOLOMON. That is not evidence on the record, and I am not going to talk about facts that are going to be introduced either by the general counsel or by Boeing in this case.

Mr. GOWDY. Mr. Solomon, can you name me a single, solitary worker in Washington State who has lost their job as a result of Boeing's decision to build a separate, distinct line of work in Charleston?

Mr. SOLOMON. Not at this time, no.

Mr. GOWDY. Can you name me a single, solitary employee in Washington State who has lost a benefit as a result of Boeing's decision to build a separate, distinct line of work in Charleston?

Mr. SOLOMON. Not at this time, no.

Mr. GOWDY. Then where is the retaliation, Mr. Solomon?

Mr. SOLOMON. The theory of the complaint is that the decision to build the second line in South Carolina was motivated by the employees having exercised their Section 7 rights.

Mr. GOWDY. Which goes exactly to the first question I asked you. So I am going to ask you again. Can Boeing factor in the fact that customers are going to leave them if the work stoppages continue? Is that among the myriad factors? Can they factor that in?

Mr. SOLOMON. Boeing will introduce evidence saying that they had reasons other than——

Mr. GOWDY. Mr. Solomon, you are the prosecutor. You get to decide whether or not there is probable cause.

Mr. SOLOMON. Yes, but Boeing—all I'm——

Mr. GOWDY. You didn't have to file this complaint. You did not have to file this complaint.

Mr. SOLOMON. Of course.

Mr. GOWDY. You get to exercise your discretion and whether or not probable cause exists that a violation occurred.

Mr. SOLOMON. Yes.

Mr. GOWDY. So I am asking you, as part of your deliberative process, did you factor in whether or not Boeing can consider the likelihood of losing customers if the work stoppages continue in Washington State?

Mr. SOLOMON. We believe that the evidence will show that Boeing was motivated by retaliation for their employees' Section 7 rights and their right to strike.

Mr. GOWDY. And I will ask you again. Where is the retaliation? Do you agree that there are more employees at Boeing in Washington State now than there were when you filed your complaint?

Mr. SOLOMON. There are now——

Mr. BRALEY. Mr. Chairman, I have a point of order.

Chairman ISSA. The gentleman will suspend. The gentleman will state his point of order.

Mr. BRALEY. Under Rule 9(e) of the committee rules, I object to this line of questions. It is not relevant to the subject matter before the committee, and it is in violation of the chairman's stated limitation on the scope of the hearing.

And I would like a ruling on my objection.

Chairman ISSA. The chair will rule. The line of questioning, as the chair interprets it, is about the gentleman's decision process leading to an action already completed and is not work product-related to any pending case or prosecution.

The gentleman is not—his point of order is not accepted. The gentleman may continue.

Mr. BRALEY. Mr. Chairman, I have a further point of order then.

Chairman ISSA. The gentleman will state his point of order.

Mr. BRALEY. Mr. Chairman, a prosecutor who is in charge of determining probable cause and then overseeing the eventual prosecution of a claim does not waive any work product or attorney-client privilege to the client that he or she represents. And therefore, the chairman's ruling is inappropriate and in violation of Rule 9(a).

And I would like to have a ruling on that objection as well.

Chairman ISSA. I rule it not correct.

Mr. Solomon, I said I would return to the question if we got into this situation. So if you don't mind, briefly I would like to—we had agreed that that which was public. Now if you are not aware of it being public, you certainly can say that. That which was public was acceptable. That which was already part of a decision you had made, but not directly a strategy.

For example, if Mr. Gowdy were to ask you how you plan to discount that possibility or whether that was a major factor, minor factor, however you were going to present it as a factor, that would be within the line of future work. My understanding, and hopefully, you will acknowledge, those things which you already know and were part of your decision process or those things which are public or discoverable—in other words, entitled to be discovered by Boeing—would be considered to be reasonable to be asked about that.

Do you still agree that that is within the bounds of this?

Mr. SOLOMON. I think where we part company is that I do not plan to disclose what's in the investigative file, and regardless of what's in the——

Chairman ISSA. Because that is not discoverable and already discovered by Boeing?

Mr. SOLOMON. Correct.

Chairman ISSA. So they are not entitled to know what you are going to present?

Mr. SOLOMON. That is correct.

Chairman ISSA. Okay.

Mr. SOLOMON. And right now, as we are sitting here, the parties are engaged in subpoena issues and disagreements over—over documents and information being exchanged from—to, you know, each has asked others and——

Chairman ISSA. And you have my total support if, in fact, it is subject to ongoing debatable discovery, we do not intend on preempting that discovery.

One last question. Hopefully, we will get back to Mr. Gowdy. You are the foremost expert on whether or not—at your agency whether or not something is part of consideration. We are not asking, I don't believe, for anything that would say isn't it true that if you found this, then you shouldn't have brought that. That would obviously exceed our scope.

But if something is within the bounds of consideration, part of it, and does not dissuade the fact that some other action could cause an action, it would seem logical that you would be answering those questions.

Can you agree and attempt to give an answer to Mr. Gowdy as to whether what I think you are saying, which is, yes, it is one of the considerations, but it is not part of our structure of the case. Meaning, yes, they are allowed to consider that. But, no, that is not the basis.

In other words, elimination, that is not why we brought the case. We didn't bring the case because they had a right to do that. We brought the case based on the items which you have previously stated. If you could do that, perhaps we can move on without any further appeals.

Mrs. MALONEY. Well, Mr. Chairman, I——

Chairman ISSA. Once again, I am talking to the witness, please.

Mr. SOLOMON. The part that I'm struggling with, Mr. Chairman, is that whether things are in the public—because they've been in the newspaper doesn't make them true. Because they've been in the newspaper doesn't mean that it's part of Boeing's defense. And you know, the hearing, when the hearing gets to the substantive part of this case, Boeing will have complete and ample opportunity to present their side of this story.

And that's where that's——

Chairman ISSA. Okay. If we can try to go forward a little longer with Mr. Gowdy's questions, of those items which are not part of that not yet discovered.

Yes, ma'am?

Mrs. MALONEY. May I join my colleague in objecting? I find it highly unusual——

Chairman ISSA. The chair has already ruled. We have had a colloquy——

Mrs. MALONEY. I am bringing my own objection.

Chairman ISSA. The chair has already ruled.

Mrs. MALONEY. I am bringing my own.

Chairman ISSA. It is not in order to bring duplicate agenda.

Mrs. MALONEY. Okay. I am bringing a different one.

Chairman ISSA. The chair recognized Mr. Gowdy.

Mrs. MALONEY. I am bringing a different objection.

Mr. GOWDY. Thank you, Mr. Chairman.

Chairman ISSA. What would——

Mrs. MALONEY. And my objection is that you are calling before your committee an ongoing case that is taking place right now——

Chairman ISSA. The gentlelady——

Mrs. MALONEY [continuing]. And you are calling the prosecutor of that case——

Chairman ISSA. The gentlelady is not recognized. Please, Mr. Gowdy?

Mrs. MALONEY [continuing]. Before here and no one from Boeing.

Mr. GOWDY. Thank you, Mr. Chairman.

Mrs. MALONEY. Now is that intimidation, or is that——

Mr. GOWDY. Mr. Solomon.

Mrs. MALONEY [continuing]. Prejudice, or is that just plain unfair?

Chairman ISSA. The gentleman will suspend. I want to make it clear we did not invite Boeing. We did not believe it was appropriate to have members of the union or members of the company here.

But having said that, the minority picked its witness, and your witness is here. If you had wanted Boeing to be here, that could have been your choice.

The gentleman is recognized.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. Solomon, I certainly didn't intend for my questions to rile my colleagues on the other side, and I thought we had moved on past that. I thought that we were discussing whether or not you could name any employees in Washington State who had lost their jobs as a result of Boeing's decision to move to Charleston, and you said no.

Mr. SOLOMON. I said not at this time.

Mr. GOWDY. And I asked you whether or not you could name any employees in Washington State who had lost a benefit as a result of Boeing's decision, and you said no.

Mr. SOLOMON. Not at this time.

Mr. GOWDY. And I asked you where the retaliation was.

Mr. SOLOMON. The decision, the theory of our complaint is the decision to build the second line in North Charleston was in retaliation for the employees' right to strike.

Mr. GOWDY. And then we got back to whether or not, hypothetically, a company not called Boeing can factor in its likelihood of losing customers as it decides to pick a location for a separate, distinct new line of work.

Mr. SOLOMON. Companies can make nondiscriminatory reasons for relocating work, making new work, whatever, and that is not a violation of the National Labor Relations Act.

Mr. GOWDY. I am not going to ask you about the use of the word "mothball" because I don't have any evidence that you used it. Although it has been alleged to have been used in connection with this, I find no evidence that you used it.

Mr. SOLOMON. I did not.

Mr. GOWDY. But essentially, the remedy you are asking for is tantamount to mothballing it. I mean, it is very clear, paragraph 13, you want this line of work moved back to Washington State.

Mr. SOLOMON. The time is up. But I would like to describe this, if I may?

Chairman ISSA. Please, you may respond.

Mr. GOWDY. Mr. Chairman, I would ask for 30 more seconds, given the fact there was a little bit of commotion when I was——

Chairman ISSA. Without objection, so ordered.

Mr. GOWDY. Thank you.

Mr. SOLOMON. When the National Labor Relations Act finds a violation, alleges a violation, I'll say the general counsel issues a complaint with an allegation of Section 8(a)(3). The general counsel alleges as a remedy to return to the status quo ante. That means where things would have stood, but for that discrimination. That——

Mr. GOWDY. I have one final question, and I will be through along those lines.

Mr. SOLOMON. Well, could I just say one thing before you do it?

Mr. GOWDY. Sure.

Mr. SOLOMON. That is our—we have what we call notice pleadings, that our complaint is to put people on notice this is the violation. This is the remedy. But that is the beginning of the conversation. It is not the end of the conversation.

Mr. GOWDY. It is not an exclusive remedy. You would settle for something less than that?

Mr. SOLOMON. Boeing will have every opportunity at the hearing to establish that it would be unduly burdensome for them to take the second line back to Washington State, and that will be heard by the judge.

Mr. GOWDY. All right. I have one more question, and then I am done. If Boeing had picked Brazil instead of Charleston, what would the remedy be?

Mr. SOLOMON. It would be the same. We would have—the complaint would look the exact same as it does now.

Mr. GOWDY. What jurisdiction do you have in Brazil?

Mr. SOLOMON. It is not a question of Brazil. It is a question of Boeing, if we have jurisdiction over Boeing. If Boeing had completely moved to Brazil, it would be out of the jurisdiction of us.

Mr. GOWDY. China? Same answer?

Mr. SOLOMON. Yes.

Mr. GOWDY. India?

Mr. SOLOMON. Yes.

Mr. GOWDY. Thank you, Mr. Chairman.

Chairman ISSA. Thank you.

Ms. Norton.

Ms. NORTON. My good friend Mr. Gowdy is a former U.S. attorney and ought to know the difference between asking legal hypotheticals, which are appropriate, and trying to try this case before this committee. When he asks Mr. Solomon to name employees who have lost their jobs or words to that effect, he has gone to matters that could only be put in evidence and is highly inappropriate.

Let me——

Chairman ISSA. Would the gentlelady yield for just a question? I will give you the additional time.

You know, not being as knowledgeable as all of you prosecutors here, isn't it true that normally a case begins by displaying facts not in dispute, and that is normally the beginning of a case. And that would apparently likely be a fact not in dispute, and that is what I thought——

Ms. NORTON. What would be the fact not in dispute, Mr. Chairman?

Chairman ISSA. That no one had yet lost their job. Nobody has lost their job.

Ms. NORTON. I don't know if that is in dispute or not, Mr. Chairman.

Chairman ISSA. Well, the gentleman seemed to be asking to get an answer.

Ms. NORTON. Yes, well, he was asking what he had heard in the newspapers. You don't know what is in dispute because there is no record in this case, Mr. Chairman. And you have said that you will, in fact, protect the process, and that is all I am trying to do here.

In fact, I would like to—my questions go to process. First of all, I would like to congratulate the lawyers in the case because while there have been frequent complaints that go to remedy, that go to motivation, I found your testimony, Mr. Miscimarra, your testimony, Mr. Getman, to be both lawyer like. In fact, they educated me.

But let me give you a hypothetical because I do think a legal hypothetical is always allowed. This case is nothing at the moment. No record, no nothing. It could be found in favor of those who want the work in South Carolina. It could be found in favor of those in Washington.

And I have no idea, particularly when reading your testimony, which was like briefs, as to how this could be decided. This is difficult, these cases involving capital investment.

Now let me give you this hypothetical. We know this case might go to the National Labor Relations Board. So, you know, the whole board that is supposed to hear it has not heard it. There is no record for them to hear.

It could go to the Court of Appeals. It could even go to the Supreme Court. I agree with you, Mr. Miscimarra. Times have changed. Nobody, in fact, in 1933 had in mind this, and that is a question for Congress to consider. What do you do when the economy changes in this way? You really have me to thinking about that.

But let me ask you this. Suppose we were now before the board or the Court of Appeals, and those hearings go on for some time. And in the middle of those proceedings, a committee of Congress called Mr. Solomon or other counsel before the committee.

In your judgment, as members of the bar, as officers of the court, I ask you would it be appropriate for this committee in the middle of proceedings of the board, the Court of Appeals, to summon, whether voluntarily or not, counsel who are engaged in their business before one of those bodies?

Mr. Miscimarra.

Mr. MISCIMARRA. Yes. My mother actually taught me if you ever receive a congressional subpoena, you should comply with it. [Laughter.]

Ms. NORTON. Mr. Miscimarra——

Mr. MISCIMARRA. Yes?

Ms. NORTON [continuing]. Then you better listen to my question. It said either voluntarily because you wanted to avoid, of course, the unseemliness of a subpoena, or by subpoena. So do not take the subpoena—as a member of the bar, I would hope you would respond to a subpoena.

I am asking you about the appropriateness, as you well understand, of asking counsel in the middle of proceedings before a court of law to come before a political body. That is my question, Mr. Miscimarra.

Mr. MISCIMARRA. Yes, and my response, Representative Norton, would be—would be this. I know that the committee has many, many lawyers that focus on separation of powers. I've spent almost 30 years studying very hard and having a great deal of experience with——

Ms. NORTON. Mr. Miscimarra, I have only 5 minutes. You see these other people have taken more time than they were even allotted.

Mr. MISCIMARRA. Sure.

Ms. NORTON. I am just asking you is it appropriate? You are a member of the bar. Is it appropriate in the middle of the proceedings before the Court of Appeals or before the board for a committee of Congress to have a counsel come here? Yes or no, sir?

Mr. MISCIMARRA. Yes. My response, Representative Norton, is that is not an area—I've spent 30 years focused on major business restructuring. I've not spent 5 minutes focusing on the appropriate response if you get a congressional subpoena.

Ms. NORTON. All right. But of course, we are not talking about a subpoena necessarily.

Mr. MISCIMARRA. Okay.

Ms. NORTON. But I respect what you say. You are not sure there.

Professor Getman, you have spent 50 years looking at these matters.

Mr. GETMAN. I wish you wouldn't have pointed that out, Congresswoman. [Laughter.]

Ms. NORTON. You pointed it out.

Mr. GETMAN. Good point. I'm very concerned about the appropriateness of this hearing. In fact, that's the reason that I'm here. I want to point out quickly that everything I've written, I've always been critical of the National Labor Relations Board at some point. So I am far from a flunky of the board.

But on the other hand, I believe that the board plays a vitally important function and that—and any effort, whether intentional or not, that would tend toward intimidation of the board in its function of protecting the rights of workers seems to me to be a terrible mistake, no matter how popular it may be.

And I really want to defend the board for probably the first time in my life and say that the board's processes that are underway are legitimate, and I think it's inappropriate to engage in any effort which looks as though it might interfere with that.

Chairman ISSA. I thank the gentleman.

Mr. Farenthold.

Ms. NORTON. You are going to cut me off when you gave Mr. Gowdy extra time, when you, yourself, have interrupted people who were doing questions?

Chairman ISSA. I am trying to move this along because at 2:30 p.m., the Governor will be here. I am doing the best I can.

Ms. NORTON. Oh, heaven forbid. Heaven forbid that we are not through our questions before the Governor comes.

Chairman ISSA. Thank you, gentlelady.

Mr. Farenthold.

Mr. FARENTHOLD. Thank you very much, Mr. Chairman.

I am going to try to keep this, in deference to the subject matter, more at the 30,000-foot level than in the weeds. But I did have just a quick personal question for Mr. Solomon.

I noticed you were from Seattle or you started your career in Seattle?

Mr. SOLOMON. I started my career at the——

Mr. FARENTHOLD. And how much time did you spend in Seattle?

Mr. SOLOMON. Hmm?

Mr. FARENTHOLD. How much time did you spend in Seattle?

Mr. SOLOMON. I was—about 2 years total.

Mr. FARENTHOLD. Okay. So it would be fair to say you probably still have some friends there?

Mr. SOLOMON. Yes.

Mr. FARENTHOLD. All right. Let me visit a little bit about this. You talk about—I guess my question is, has this ever happened in the past where there has been an action against a business for starting a whole new line of business somewhere else, or is this a first?

Mr. SOLOMON. There has been a line of cases as long as there's been an act of what have been called runaway shops. And companies have moved from the north to the south, from various, southwest, and——

Mr. FARENTHOLD. But I mean, that is typically moving people. That is not new people.

Mr. SOLOMON. The theory of our complaint does not depend on whether it's new work or not.

Mr. FARENTHOLD. All right. So let me ask you, do you envision a scenario where any set of facts that a company was moving from a union State to a right-to-work State after a strike, that the strike wouldn't be—or the move wouldn't be considered a retaliation?

Mr. SOLOMON. Congressman, I cannot conjecture about cases and fact patterns that are not before me.

Mr. FARENTHOLD. All right. Were there any discussions with the White House or the administration before pursuing this case?

Mr. SOLOMON. Absolutely not.

Mr. FARENTHOLD. All right. Now we are focused in this country right now on putting people back to work and getting jobs, be they union jobs or nonunion jobs. We have unemployment at over 9 percent.

Do you think that this case and the uncertainty that it creates—not just with Boeing, but with other businesses looking to expand—might have a chilling effect on creating jobs?

Mr. SOLOMON. Congressman, the National Labor Relations Act applies to big companies, little companies, whether the impact would have been $750 or $750 million. I have to issue complaint if the—if I have reasonable cause to believe that the National Labor Relations Act has been violated.

Mr. FARENTHOLD. And do you think the amount of delay, that these cases typically run for years, again, do you think the delay might have an effect on companies and creating jobs and the amount of time and money that it is costing to do it?

Mr. SOLOMON. I would answer that question by telling you that I never—I was a reluctant issuer of this complaint. I wanted it settled. I thought it was in everybody's best interest to be settled. The parties have a longstanding relationship with each other, going in the past, in the future, and I would have preferred them working this out.

Mr. FARENTHOLD. All right. Let me ask Mr. Miscimarra. You heard Mr. Solomon say that this is kind of the ordinary course of business. In your practice in this area, would you consider this to be a unique or unprecedented, this case?

Mr. MISCIMARRA. Well, I think there are two things maybe that one would consider unique. One is very few companies have $750 million sitting around, and that's one of the problems when you have a process that is so protracted in these cases.

I do think on the theory of the case, I think it's very unusual, and I disagree with Professor Getman on this. Section 8(a)(3), which is the basis of the runaway shop claim, prohibits discrimination in relation to terms and conditions of employment.

Mr. FARENTHOLD. Okay.

Mr. MISCIMARRA. And I'm not aware of any precedent that suggests an investment decision would be——

Mr. FARENTHOLD. All right. I am sorry. I am just about out of time. I have one more question for Mr. Solomon.

Would the decision have been the same to prosecute this if they were moving from Washington, say, to California or another State that wasn't a right-to-work State?

Mr. SOLOMON. Under these same facts, yes.

Mr. FARENTHOLD. Okay. Thank you.

Chairman ISSA. If the gentleman would yield? So if they move between two union—the same union in two different locations, it would still be retaliation, if it was all International Machinists?

Mr. SOLOMON. Well, I don't think we'd be—I don't think machinists would have brought a charge if it was going from one machinist plant to another.

Chairman ISSA. So if the machinists win, there is no problem. If the machinists feel they are losing, then we have a potential problem is what you are saying?

Mr. SOLOMON. In this case, it was machinists to a nonunion facility, and we——

Chairman ISSA. So, again, Ms. Ramaker, the union set up a failure, treated them badly. They voted the union out, and the reprisal is that they brought this claim for your reluctant consideration?

Mr. SOLOMON. That is a charge that has been filed yesterday with us.

Chairman ISSA. Thank you.

Okay. I would ask unanimous consent my letter to you, Mr. Solomon, be placed in the record only because it cites some of the constitutional issues of why we are here and why there is an independent oversight responsibility.

Without objection, so ordered.

[The information referred to follows:]

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June 14, 2011

Mr. Lafe E. Solomon
Acting General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570-0001

Dear Mr. Solomon:

Thank you for your June 10, 2011, letter. I look forward to your testimony at the Committee's June 17, 2011, hearing in North Charleston, South Carolina. The hearing is scheduled to begin at 12:00 p.m. EST.

The due process rights of litigants are of significant importance to the Committee. However, the reasoning offered to support your position that your testimony before the Committee could jeopardize these rights is based on a flawed analysis of the law. I write to assure you that your concerns are misplaced. As you recognized, Congress has a Constitutional obligation to exercise its oversight responsibility. Flowing from this basic tenet, courts adopt a narrow view of who is a decision-maker in quasi-judicial actions when analyzing due process rights related to Congressional activity.

Your concerns regarding your participation in the hearing are misplaced for several reasons. In your capacity as Acting General Counsel for the National Labor Relations Board (NLRB), you are not a decision-maker within the scope of *Pillsbury Company v. Federal Trade Commission.*[1] the leading case on Congressional intervention in agency decision-making. In addition, the hearing is focused on understanding the policy implications of your decision to bring suit against Boeing for unfair labor practices. You have already filed the Complaint; therefore, Congress cannot interfere with your decision. Finally, while I do not believe this Committee's oversight has any implications for the due process rights of the litigants, to the extent that it may, such a claim is for the affected parties to raise, not the agency, in federal court after a decision has been rendered by the agency.

[1] 354 F.2d 952 (5th Cir. 1966).

As to the question of whether as Acting General Counsel you are a "decision-maker" within the scope of *Pillsbury*, your analysis omits key facts.[2] While it is correct that in the *Pillsbury* case, in addition to the Federal Trade Commission (FTC) Chairman, "other FTC officials," including "the then general counsel," were also questioned during Congressional Committee proceedings, your letter fails to include a very important and determinative fact that the then-general counsel later became Chairman of the FTC who "wrote the final [FTC] opinion" from which the issue in *Pillsbury* generated.[3] Further, it is clear that the holding of the case rests on the questions posed to the Chairman at the time, as well as the other Commissioners "who actually participated in the [FTC's] final decision."[4] As participants in the *final* decision, they determined the ultimate outcome. In the NLRB's case against Boeing, you will not determine the ultimate outcome. As you stated in your June 10, 2011, letter, "ultimately, the administrative law judge, the National Labor Relations Board, and the courts will *decide* [the merits of] Boeing's actions."[5] (emphasis added). Accordingly, under the precedent established in *Pillsbury*, your testimony before the Committee does not threaten the rights of the litigants.

In other cases cited in your letter, you fail to clearly identify the capacity in which certain decision-makers have served when the courts have analyzed whether they were influenced by Congressional intervention. Such facts are crucial to a proper analysis of whether these cases are analogous to the circumstances before us. In the case of *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*,[6] the Brigadier General was the Assistant Judge Advocate General for Civil Law, and, as such, was the "only official empowered to *order* debarments." (emphasis added). Therefore, the Brigadier General was the "ultimate decision-maker."[7] In *D.C. Federation of Civic Associations v. Volpe*,[8] the Secretary of Transportation was the ultimate decision-maker who allowed a bridge project to be part of an Interstate System.[9] By contrast, your role in the Boeing case is not analogous to the ultimate decision-makers in the cases you cite. Finally, in *SEC v. Wheeling-Pittsburg Steel Corp.*,[10] the court did not conduct a *Pillsbury* analysis, nor did it analyze due process rights. In fact, the court does not cite *Pillsbury* at all, and the lower court specifically rejected its relevance.[11]

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[2] *See* Letter from Lafe E. Solomon, Acting General Counsel, National Labor Relations Board to Rep. Darrell Issa, Chairman, House Oversight and Government Reform Committee (June 10, 2011), [hereinafter Solomon Letter June 10].
[3] *Pillsbury*, 354 F.2d at 955.
[4] *Id.* at 956.
[5] Solomon Letter June 10, *supra* note 2.
[6] 714 F.2d 163 (D.C. Cir. 1983).
[7] *Id.* at 165, 170.
[8] 459 F.2d 1231 (D.C. Cir. 1971).
[9] *Id.*
[10] 648 F.2d 118 (3rd Cir. 1981).
[11] *SEC v. Wheeling-Pittsburgh Steel Corp.*, 482 F. Supp. 555 (D. Pa. 1979), *vacated and remanded*, 648 F.2d 118 (3rd Cir. 1981).

Your assertion that I incorrectly characterized *Koniag v. Andrus*[12] as declining to extend *Pillsbury* to agency employees or advisors is also misplaced.[13] The D.C. Circuit did not expressly hold that *Pillsbury* applies to agency employees or advisors. Instead, it noted, in dicta, that "one *possible* exception was a close advisor to the Secretary [of Interior];"[14] however, it did not necessarily "assum[e]" the advisor was a decision-maker for the purposes of *Pillsbury* as you state.[15] (emphasis added). In fact, a focus of the lower court's analysis, which was reversed in part by the D.C. Circuit, was on that same advisor to the Secretary.[16]

It is clear that as Acting General Counsel charged with overseeing litigation, you are not a decision-maker for *Pillsbury* purposes. Moreover, to the extent that a court may find otherwise, your decision to file the Complaint has already been made. This is relevant because courts are "concerned when congressional influence shapes [an] agency's determination of the merits."[17] Courts consider the "decision-maker's input, not the legislator's output," and they analyze whether "extraneous factors intruded into the *calculus of consideration* of the individual decision-maker."[18] Here, you received input from the International Association of Machinists and Aerospace Workers, not Congress, when you considered the merits of Boeing's actions before filing the Complaint. The courts presume that any further decision you make concerning the case will be executed knowing that you are a "[man] of conscience and intellectual discipline capable of judging a particular controversy fairly on the basis of its own circumstances."[19] This principle of course applies to the Administrative Law Judge and the members of the National Labor Relations Board as well. Further, the courts recognize that elected representatives are permitted to ask questions of and demand information from agency officials when conducting Congressional oversight.[20] Indeed, courts have held that "communications between Congress and agencies help to guarantee the political accountability of unelected agency decision-makers."[21] Such interaction is part of the "vigorous engagement that gives rise to the system of checks and balances in our government."[22]

You represented to me in your June 3, 2011, letter that one of the reasons you could not testify at the Committee's hearing is because you would be "overseeing the

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[12] 580 F.2d 601 (D.C. Cir. 1978).
[13] Solomon Letter June 10, *supra* note 2.
[14] *Koniag*, 580 F.2d at 610.
[15] Solomon Letter June 10, *supra* note 2.
[16] *Koniag, Inc. v. Kleppe*, 405 F.Supp. 1360 (D.D.C. 1975), *affirmed in part, reversed in part, Koniag v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978).
[17] *ATX, Inc. v. U.S. Department of Transportation*, 41 F.3d 1522, 1528 (D.C. Cir. 1994).
[18] *Id.*
[19] *Gulf Oil Corp. v. Federal Power Com.*, 563 F.2d 588, 612 (3rd Cir. 1977).
[20] *See ATX, Inc.*, 41 F.3d at 1528.
[21] *United States of America v. Mardis*, 670 F.Supp.2d 696, 703 (D. Tenn. 2009); *Sokaogon Chippewa Community v. Department of Interior*, 929 F.Supp. 1165 (D. Wis. 1996).
[22] *Mardis*, F.Supp.2d at 703.

litigation in Seattle" at that time.[23] Subsequent to that letter, your office informed my staff that you will be in Washington, D.C., during the week of the Committee's hearing.[24] I do not know the reason for this apparent change of events, but the fact that you will not be in attendance at the hearing before the Administrative Law Judge further affirms that you are not a decision-maker for *Pillsbury* purposes.

With respect to your view that agencies are in a position to raise claims of Congressional intervention, it is telling that each case you cite is the result of a claim initiated by a private party, not a federal agency. Therefore, you provide no legal precedent to support your position.[25] Even if it were hypothetically appropriate for an agency to raise a claim of Congressional intervention related to the due process rights of litigants, the time to bring such a claim is after a final agency decision is rendered.[26] This is because a court's analysis will turn on whether the decision-maker was in fact influenced by Congress.[27] As you know, this case is pending. As for the other issues of privilege you raise, it is the practice of the U.S. Senate and the U.S. House of Representatives, grounded in Congress' constitutional power to investigate, to leave to the Congressional committee the determination of whether to recognize claims of attorney/client privilege or attorney work product.[28]

You proclaim your efforts to avoid testifying are guided by an attempt to prevent a "negative impact on the rights of the litigating parties;"[29] yet, when it comes to the impact on South Carolina employees whose jobs are at risk, you seem less concerned. Indeed, you opposed a motion by three current Boeing employees to intervene in the case, stating that those employees have "no cognizable interest...sufficient to justify their intervention."[30] Further, you believe that allowing their participation "would merely delay and complicate" the proceeding.[31] To the contrary, I believe that these employees, the people of South Carolina, and the rest of the citizens of the United States have a right to know the public policy implications of your actions.

In your June 10, 2011 letter, you mention that the administrative process should take "its usual course;" however, there is nothing usual about your present course of action. As you know, 16 Attorneys General from both right-to-work states and non-right-

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[23] *See* Letter from Lafe E. Solomon, Acting General Counsel, National Labor Relations Board to Rep. Darrell Issa, Chairman, House Oversight and Government Reform Committee (June 3, 2011).
[24] NLRB Staff to Committee Staff, Telephone Conversation, June 9, 2011.
[25] Solomon Letter June 10, *supra* note 2.
[26] *See Kiewit*, 714 F.2d at 169.
[27] *Id.*
[28] CRS Report 95-464, Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry, by Morton Rosenberg.
[29] Solomon Letter June 10, *supra* note 2.
[30] Acting General Counsel's Opposition to Motion to Intervene by Dennis Murry, Cynthia Ramaker, and Meredith Going, Sr., *Boeing and International Association of Machinists and Aerospace Workers District Lodge 751*, affiliated with *International Association of Machinists and Aerospace Workers*, before the National Labor Relations Board, Region 19, United States of America, Case No. 19-CA-34231.
[31] *Id.*

to-work states filed an amicus brief in the case and called the proceedings "unprecedented."[32] They believe the NLRB's actions will not only harm "[their] States' ability to attract new employers and jobs for [their] citizens, but [will] also...harm the interests of the very unionized workers whom [your] Complaint seeks to protect."[33] The policy implications of your interpretation of the National Labor Relations Act (NLRA), coupled with the corresponding impact on jobs, are far too great for Congress to ignore. Therefore, as recognized by the Supreme Court, the Committee is appropriately inquiring about your administration of an existing law.[34]

As you know, the NLRB is an agency that was created by Congress and is accountable to Congress.[35] Further, taxpayers have a strong interest in how the NLRB is carrying out its legislative mandate under the NLRA. Therefore, I must insist you appear before the Committee to testify in South Carolina on June 17, 2011. If you have any questions, please contact Rob Borden or Kristina Moore of the Committee staff at 202-225-5074.

Sincerely,

Darrell Issa
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Member

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[32] Amicus Curiae Brief of Sixteen State Attorneys General in Support of Respondent the Boeing Company, *Boeing and International Association of Machinists and Aerospace Workers District Lodge 751*, affiliated with *International Association of Machinists and Aerospace Workers*, before the National Labor Relations Board, Region 19, United States of America, Case No. 19-CA-34231.
[33] *Id.*
[34] *See Watkins v. United States*, 354 U.S. 178 (1957).
[35] 29 U.S.C. § 153.

Chairman ISSA. Mr. Kucinich.

Mr. KUCINICH. Thank you very much, Mr. Chairman.

In looking at the National Labor Relations Act, Section 8(a), it describes unfair labor practices. "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7," and then it goes on to spell out other violations.

I want to, for the purposes of an instructional exchange here, Mr. Solomon, so it is illegal for any employer to make coercive statements to their employees?

Mr. SOLOMON. Yes.

Mr. KUCINICH. Is it illegal for employers to threaten their employees?

Mr. SOLOMON. Yes.

Mr. KUCINICH. If employees engage in a strike, is that a legally protected activity?

Mr. SOLOMON. It is, Congressman. And if I could take just a moment, there's also Section 13 of the National Labor Relations Act that, again, Congress passed in 1935 that says, "Nothing in this act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right."

Mr. KUCINICH. So if a company threatens its employees for engaging in strikes now or in the future, is it a violation of the National Labor Relations Act?

Mr. SOLOMON. Yes.

Mr. KUCINICH. Now, Professor Getman, you said that officials of Boeing have confessed to violations of the law in this regard. Did you not say that?

Mr. GETMAN. I said that's the—what I get from the statements included in the complaint. One can always say maybe they could explain it. But on the surface, there seems to be a very powerful case along the lines that you are suggesting of attempting to intimidate and of retaliation, yes.

Mr. KUCINICH. So the Seattle Times reported that Boeing executive vice president Jim Albaugh said, "The overriding factor was not the business climate, and it was not the wages we are paying people today. It was that we can't afford to have a work stoppage every 3 years." That is a direct quote.

Now, Professor Getman, in the context of what you know about the National Labor Relations Act and in the context of what was going on in Washington State at the time, when you hear that quote, what does that make you think?

Mr. GETMAN. Well, I think it's a double unfair labor practice, actually. That is, the statement itself is a form of intimidation. Just making that statement because you know that the workers at Boeing are going to hear this, and it's like telling them, "Don't strike, or this is what you're going to get."

Plus, it's an indication that they made the move for that purpose, which is a separate violation. There are actually two violations caught up in that one phrase—one of intimidating and one of taking away work.

Mr. KUCINICH. So then what would your answer be, as a professor of law in this area, as to whether or not Boeing unlawfully retaliated against its Washington State workers who are lawfully exercising their right to strike?

Mr. GETMAN. Now here I have to be professorial and lawyer like. If that's all the evidence, I know that there's a very strong prima facie case. Let the hearing go forward. Let Boeing explain. Let them bring out whatever evidence they have.

I'm not willing to convict Boeing on the basis of this statement. I am willing to say it's proper to force them to explain what does this mean? Is it in any way different from the way it appears?

Mr. KUCINICH. But if, in fact, Boeing planned to transfer jobs away from Washington for the purposes of retaliating against the workers in Washington who were lawfully exercising their right to strike, would that be a violation of the National Labor Relations Act?

Mr. GETMAN. Yes.

Mr. KUCINICH. Okay. I yield back.

Chairman ISSA. Thank you.

The gentleman from Florida, Mr. Ross?

Mr. ROSS. Thank you, Mr. Chairman.

Mr. Solomon, the standard of proof necessary to prosecute, the standard to prosecute is what?

Mr. SOLOMON. To bring the complaint?

Mr. ROSS. Not to bring the complaint, but to be successful in prosecution.

Mr. SOLOMON. Preponderance of the evidence.

Mr. ROSS. So it is not overwhelming. It is not clear and convincing. It is not beyond a reasonable doubt. And you feel that in your negotiations between the sides that you had sufficient evidence—I am not asking what it is. But you had sufficient evidence at that time to meet that preponderance of the evidence burden?

Mr. SOLOMON. Yes.

Mr. ROSS. Okay. Now, with regard to standing, NLRB is there to just protect union workers?

Mr. SOLOMON. Absolutely not.

Mr. ROSS. And that is why the machinists were able to because they had standing, they were able to file this complaint. Now, nonunion workers, the NLRB is there to protect them as well. Correct?

Mr. SOLOMON. Absolutely.

Mr. ROSS. And what would their standing—is there a different standard for standings between one or the other?

Mr. SOLOMON. No. We investigate every single charge that's filed in every one of our regional offices. They can be filed by any individual, any company, any union.

Mr. ROSS. But they are no lesser than each other? Whether a union worker or a nonunion worker, their standing is the same?

Mr. SOLOMON. That is correct, if they're the charging party.

Mr. ROSS. So if someone moved to intervene in this particular case who is nonunion, they should have standing and should be allowed to intervene, shouldn't they?

Mr. SOLOMON. The intervention——

Mr. ROSS. They should, shouldn't they? I mean, unless there is some extenuating circumstance that says you don't have standing because you are not an employee or you are not a resident there.

Mr. SOLOMON. Yes. There is longstanding—there are longstanding board principles that apply to intervention. The judge in Seattle was the one who ruled that the employees did not have standing, and that is on appeal to the board in Washington.

Mr. ROSS. What was your position on that? Did you support or oppose that motion to intervene?

Mr. SOLOMON. We opposed it.

Mr. ROSS. Well, why is that?

Mr. SOLOMON. Under longstanding board principles, the employees' interests will be adequately represented by Boeing.

Mr. ROSS. Not by the NLRB because of why? I mean, you are there for equal standing. Correct? In fact, wasn't one of the reasons that Boeing employees wanted to intervene in this case was to show that there was no union bias. That at the time Boeing was in South Carolina, they were partly unionized.

If they had stayed unionized, would you have opposed the intervention?

Mr. SOLOMON. Yes.

Mr. ROSS. Really?

Mr. SOLOMON. Yes. [Laughter.]

Mr. ROSS. Now—with regard to your remedy——

Mr. SOLOMON. Yes.

Mr. ROSS [continuing]. And I know you have stated, in fact, you have stated rather strongly in your complaint, I guess on page 7, that you seek as your remedy to have the Dreamliner project removed from South Carolina and taken to the great State of Washington. Correct?

Mr. SOLOMON. We asked for the second line to be taken back to Seattle.

Mr. ROSS. Which, and as a matter of fact, the only facility here is the Dreamliner facility. Correct?

Mr. SOLOMON. As I said, Congressman, this is the——

Mr. ROSS. No, not——

Mr. SOLOMON [continuing]. The status quo remedy that is always sought by the board in an 8(a)(3), and it begins the discussion.

Mr. ROSS. But you don't have to seek that remedy. You have autonomy. You don't have to seek that remedy.

Mr. SOLOMON. Yes.

Mr. ROSS. Now what I am saying is, is that how can you say in your statement that we wish the South Carolina workers no harm, and even your office go to painstaking lengths to say, "Hey, we don't want to put people out of work in South Carolina," and yet adamantly allege as your sole remedy to have the removal of that facility from South Carolina? Can you reconcile that?

Mr. SOLOMON. I will try again to explain that this is the standard remedy that is pleaded by the general counsel in every 8(a)(3) violation, to return to what would have happened absent the discrimination.

Mr. ROSS. But it doesn't have to be, doesn't it? It doesn't have to be. It doesn't have to be. And you know, we are here because

you are saying, oh, well, by golly, we are intervening in a due process proceeding.

Well, the last time I looked that the NLRB was an arm of the U.S. Congress. It is not a constitutional judicial body, and therefore, we have oversight, and that is why we are here. But more importantly, to me, is when we allow you the opportunity to stand on privilege in not responding, and yet we also politically have to look at the fact and the reality that we have thousands of jobs that are at stake here.

And then I look at Mr. Getman who says what is the urgency? Why do we have an urgency?

Ms. Ramaker, how many jobs are at stake here in South Carolina?

Ms. RAMAKER. Thousands.

Mr. ROSS. Thousands. Mr. Whitman, with your own organization, how many jobs are at stake here?

Mr. WHITMAN. Hundreds.

Mr. ROSS. And Mr. Getman, would you not say that probably the most crucial issue to our country today is jobs? And yet you have the gall to state that there is no sense of urgency, when you can look at the Dorsey Trailer case and see that, in fact, as Mr. Miscimarra pointed out, that it is almost on point with this one.

And in fact, in Dorsey Trailers, there were actual violations, but the court found that they could not be—they were not penalized for relocating their plant from Pennsylvania to Georgia.

Mr. GETMAN. I got lost somewhere in that torrent of words.

Mr. ROSS. I understand that because I am a practicing lawyer. Now let me ask you this question. [Laughter.]

Chairman ISSA. The gentleman's time is expired.

Mr. ROSS. I will yield back.

Mrs. MALONEY. Point of information. The gentleman——

Chairman ISSA. Does the gentlelady have a question?

Mrs. MALONEY. I have a corrective point of information.

Chairman ISSA. Well, I will entertain your comment, but there is no such thing as a point of information, please.

Mrs. MALONEY. But the gentleman stated that the NLRA was an arm of Congress. It is totally separate and independent. I just wanted to get that information, point of correction.

Chairman ISSA. I believe the gentleman's statement that it was not part of the other branch, the third branch of Government was correct.

At this time, I would ask unanimous consent that the quotes, the entire quotes by the gentleman Mr. Albaugh be placed in the record.

Without objection, so ordered.

[The information referred to follows:]

JIM ALBAUGH INTERVIEW BY DOMINIC GATES[1]
March 1, 2010

TRANSCRIPT

FILE NO. 1	
Dominic	But you know I feel impelled to ask some hard questions on behalf of basically the community of Washington as a result of last year's _____. Last year we had the decision to locate the second 787 line in Charleston. And then subsequently announced that all 787 work for the Puget Sound area would be duplicated elsewhere. So I think the local community is clearly worried about Boeing's future here. That's something that's followed on from you moved the headquarters in 01 and there have been repeated threats that future work might not be here. So last year seemed to really increase that feeling. So what is Boeing's commitment to Washington State?
Albaugh	Well this is the headquarters of the Boeing Commercial Aircraft. And it will be I think for probably forever. The issue last Fall was really about how we could ensure production stability and how we could ensure that we are competitive for the long haul. We had some very productive discussions with the Union and unfortunately we just didn't come to an agreement where we felt we could ensure production stability. And we read that as getting away from the frequent strikes that we're having. And also could we stop the rate of escalation of wages. And we just could not get to a place where we both felt was a win for both ourselves and the Union, so we made the decision to go to Charleston. Now its my hope, and I will tell you Dominic, my preference is to do the work here in the future. But we'll do work here if we can make sure that we have the stability of the production lines and that we can be competitive over the long haul. And those are the two things that I think I have to ensure our customers and I have to ensure also the stockholders of the Boeing Company.
Dominic	So looking now into the future, now that you have decided on having this other plant in Charleston, how do you see the geographic shift of Boeing and the balance there between those two bicoastal plants.
Albaugh	Well, I guess I don't really see it as a balance. Clearly the center of gravity is here in Puget Sound and will continue to be here in Puget Sound. And I'm very hopeful, as we continue to have discussions with the Union, that we'll be able to come up with ways of being competitive here, and we can come up

[1] This transcript was created from video of the interview available on The Seattle Times website at http://seattletimes.nwsource.com/html/nationworld/2011237525_albaughvideo.html.

	with ways of ensuring that we're not gonna have labor strikes. And if we can get through those two hurdles, we're gonna be doing work here for a long long time. And there are no discussions of moving any work that's currently here out of Puget Sound.
Dominic	Right, but of course its future work that people are worried about. What are the chances that the next new jet after the 787 will be built here?
Albaugh	Yeah, I'll tell you, the commitment that I can give you is that the first preference is to put the work here. But we have to ensure ourselves that we're gonna have a stable production line and we have to ensure that we can be competitive over the long haul. If we don't, we're not gonna be selling any airplanes. And I think that's the worse outcome for Puget Sound and that's the worse outcome for the company.
Dominic	Well, so when the time comes to announce the launch of a new airplane program, which could come in a few years, you would say launch a new airplane program and that's the plan for it. Are we going – are the people of this State once again going to face a competition with all the states in the U.S.?
Albaugh	I guess I don't really view it as a competition.
Dominic	But it was last time.
Albaugh	I don't think it was. It was not a competition. What it was was, again, we've had strikes three out of the last four times we've had a labor negotiation with the IAM. And I'm not blaming that on the IAM. I mean that is an issue between management, created by management, and created by labor. You know, we need to improve the relationship that we have. And we've got to get to a position where we can ensure our customers that every three years they're not gonna have a protracted shutdown. You know, we have customers right now that are telling us that in contracts they don't want to write in excusable delays for strikes. That's not a situation that's good for us. That's not a good situation for them. It's not a good situation for labor. And if one projects out another 15 years, we're not just gonna be competing against the Europeans. We'll be competing against the Europeans and the Brazilians, the Canadians, and the Chinese, and the Russians. And we have an obligation to make sure that as we compete against not just one but compete against four, we have got a cost structure and productivity capability that will allow us to continue to compete.
Dominic	In saying that it wasn't a competition, clearly you're referring to the Charleston decision last year. But I was referring to the '03 competition when Boeing actually had a formal competition to find out where they were gonna build the 787.

Albaugh	Well I wasn't involved in that one and….
Dominic	So the question is will there be another competition like that when you build the next …
Albaugh	I don't think I would – if I'm involved, I'm not gonna have a competition like that, I can tell you that. But what we are gonna do is study very hard, with the first option being here, to make sure that we do the right thing for the customer, which means not have labor stoppages and do the right thing for the customer to give them the kind of value that they want in the airplanes.
Dominic	Just to dwell on the Charleston expansion for a moment, it does seem to me that the complexity and expense and risk attached to doing all that there is something that's hard to justify. Does it really make business sense?
Albaugh	There's no question that whenever you go to a greenfield site there is risk involved. At the same time, with the protracted labor stoppage that we had back last I guess the Fall of 2008 – I mean that cost the company billions of dollars. And I think if you compare what it cost because of the stoppages versus the cost and the risk of starting a new line in Charleston, I think the investment certainly is the right one for us to make.
Female	[illegible—too far away from microphone]
Albaugh	Yeah. Absolutely. Again, my first preference when I started looking at this last Fall was to stay here, and we just could not get over those two hurdles. How do we ensure stability of manufacturing and how could we ensure that labor costs weren't gonna continue to escalate.
Dominic	Do you think a chance was missed to – I mean you have a labor problem, that was clear. You just had that strike. You have a big relationship with the Union problem. Potentially you could have fixed that and got your production here and not have the expensive at Charleston. Was it a chance missed?
Albaugh	We tried. We did not get there. And you can blame both sides for that. And over the next couple of years we're gonna do everything we can to work with the Union to make sure that we don't have another stoppage and that we have a path to competitiveness over the long haul, and that we get the kind of relationship with the Union where we don't have to worry about labor stoppages in the future. You know, this is a great work force here. They are magicians. They do things that I don't think any labor force in the world can do. And I feel my job is to make sure they have jobs five years from now, ten years from now, twenty years from now. But we're not – none of us are gonna have jobs if we continue to have strikes that go on for three or four months, every three years.

Dominic	So, to sum up the Charleston decision, let's be clear. The Charleston decision – it wasn't about Washington's business plan, right?
Albaugh	It was not.
Dominic	It was not about trying to get lower labor costs going where work is cheap. It was about the strikes.
Albaugh	It was about ensuring to our customers that when we commit to deliver airplanes on certain dates, that we actually do deliver. And we have lost – our customers have lost confidence in our ability to do that because of the strikes. The other thing is the rate of escalation for the wages. They continue to go up in dramatic fashion. You know, how can we flatten that out. Those are the two things that we are after.
Dominic	Well, lets just move on to talk about the Union in a little bit more detail. You know when you came here, I think it was last July, for the rollout of the Poseidon at the subplant in Renton, you talked about – you praised that the men and women at Puget Sound have made this possible.
Albaugh	Yeah. They're fabulous.
Dominic	And you just repeated that here. And yet, that was in July, and then in the Fall. It seemed like a slap in the face to the people here to say that we're gonna build it somewhere – we're gonna take the 787 work somewhere else.
Albaugh	Yeah, you see, I guess I don't see it as a slap in the face Dominic. I think that if we don't have a company nobody has jobs. And if we can't meet the promises we make to our customers relative to delivery of aircraft, we're not gonna be in the business. If we continue to have costs that go up faster than the competition, we're not gonna be selling any airplanes. This is about making our company competitive over the long haul. By going to Charleston, I believe that we're gonna help reduced costs here. Now you say how is that possible? Well the average cost of an airplane built here and the average cost of an airplane built in Charleston goes into a program accounting. The average unit price of an airplane should go down as a result of our being in Charleston. That will create more demand for airplanes built here and in Charleston.
Dominic	But how big a component of that average cost of an airplane is actually labor. It's not a big chunk of it, is it?
Albaugh	Its not a big chunk. Its – again I'm not gonna give you the exact percentage. It's a significant percentage. Its less than half certainly. But again, I think the other bigger part of it is when we commit to delivering an airplane, people put together their business plans based on assuming they're gonna get delivery on certain dates. And when they don't get delivery it impacts their ability to meet their business plan to make money and to buy more airplanes in the long haul.

.	And they will think twice the next time they decide to buy an airplane from us or from Airbus or 10 years from now from the Canadians or the Chinese, or the Brazilians. This is gonna be a very competitive world we're in, much more competitive than its been to date. We've enjoyed a duopoly here. And all the rules are gonna change. And you know when you're in a duopoly, as we are and you're in second place, you're last place. I don't want to be in last place. I want to be in first place.
Dominic	So given what happened with the Union last year, the failure to reach agreement resulting in that decision….
Albaugh	And blame that on both of us; the fact we didn't get there.
Dominic	Well, just forgetting about blame, I'm wondering – well let me ask, first of all, what is your attitude to Unions?
Albaugh	I've always gotten along great with Unions. I've worked with them. I've walked the concrete with them. I've listened to them. I've watched them do amazing things relative to productivity. I've seen them work miracles out there in the production line. You see that every day down in Renton. You see that every day up at Everett on the Triple 7 where they're making huge strides relative to productivity.
Dominic	Well, that's the work force, but the Union itself. Boeing has often portrayed the Union as an obstacle between itself and its work force.
Albaugh	You know where there is an issue with the Union that's a reflection on management. We create the environment. We create the culture. And my hope is that we can have good relationships at the top, all the way down to the people on the factory floor. I was in a meeting last week in Washington, D.C. with some of the leadership with the IAM, and we had many things that we agree on. And I think as we go forward I hope there are more things we agree on because neither one of us are gonna be in very good shape unless we're selling airplanes.
Dominic	Was Mr. Buffenbarger there?
Albaugh	Mr. Buffenbarger was not.
Dominic	Well, but given what happened last year, you're now the new guy in position, and you've got the poison that entered the relationship as a result of failed talks. How do you fix it now?
Albaugh	I think you fix it by communicating. And I think that the IAM understands that we're entering a global economy, global competition. Its gonna be more than just ourselves and the Europeans. And our ability to be productive, you know our ability to keep the promises that we make to our customers, those are

	the things that are gonna dictate whether or not we have a company and whether or not we're selling airplanes in years to come. And I think that once we agree on where we need to go together, we can figure out a way to get there.
Dominic	Well, obviously you'd like a better relationship with IAM and you would hope to achieve it. But does the cost of labor here mean that Boeing is always gonna favor some non-Union alternative because it is gonna be cheaper?
Albaugh	You know you look at the installed base that we have here. You look at all the tooling that we've invested here. You look at all the training and the skilled work force that we have here. You look at the ability of this team to take cost out of an airplane. Those count for a lot. Those count for just as much, if not more, than just the wages. But again, the wages have gone up dramatically and we need to have the knee of that curve inched over a little bit. We can't continue to go on with the dramatic fashion we have in the past.
Dominic	I'd also like to point to a certain …….. **END OF FILE 1**
FILE NO. 2	
Dominic	_____ and you've got heavy congressional support on that.
Albaugh	We do.
Dominic	And that support in congress is based on the need to protect good American jobs. And when they talk about good American jobs and well paying American jobs, they're contrasting it to non-Union jobs in Alabama. And the Union delivered that congressional support largely – well not just the Union, but a big element. Those democratic politicians who are Union supported. That's a big element. And so the Union has delivered that for you. What do you give to the Union?
Albaugh	We got 60,000, now we got 75,000 jobs here in Puget Sound. And we're gonna have tens of thousands of jobs for years to come. But we're talking about Charleston where we may have 3, or 4, or 5,000 people. You know, clearly the Union recognizes that, certainly the politicians in the State of Washington, the elected officials, understand that this is the center of gravity. And that's not gonna change. The 767 airplane in its entirety is gonna be built here by the workers that have built this airplane in the past. Nothing is gonna change in that regard. And the last time I checked, in Charleston those were U.S. Citizens down there.
Dominic	But again non-Union and much lower paid jobs.

Albaugh	Those are well paying jobs down there.
Dominic	By the way, do you have any concerns as you look at the future? Well you've already, you've agreed with me that the business climate here wasn't a particular factor in that decision last year. Of course all the states in the Union in the current downturn are in terrible financial trouble, budgetary trouble, South Carolina as well as Washington. Do you have any concerns about changes ahead that might affect your future here in this state in terms of ....
Albaugh	Well I think you can probably say that about all the states in the country right now with the economy being what it is. But again, the overriding factor was not the business climate and it was not the wages we're paying people today. It was that we can't afford to have a work stoppage every three years. We can't afford to continue the rate of escalation of wages as we have in the past. You know, those are the overriding factors. And my bias was to stay here but we could not get those two issues done despite the best efforts of the Union and the best efforts of the company.
Dominic	You're on the company's executive council, so there is certainly a perception that chief executive McNerney(?) drove that Charleston decision and that some people here were not too happy about it. Were you a part of that decision?
Albaugh	Well, I was the one that made the presentation to the board of directors. And I went into this thing feeling that if we could get it done here, we could save the company a lot of money. And there were two things that I needed, as I mentioned. And we couldn't get those two things done. And not getting those two things done, I made the recommendation that I thought was the right one. And that was to go to Charleston.
Dominic	So, before we leave that subject entirely, there's one last thing.
Albaugh	Somehow I knew you were gonna talk about this Dominic.
Dominic	So there are – they've been talking for many years -- Boeing is out of here, Boeing is leaving, Boeing doesn't like us anymore. Can we, as a just final question on that topic....
Albaugh	You can put that one to bed. I mean we've got a terrific work force here. We've got engineers who have more depth and breadth of knowledge about building airplanes more than anyplace that I've ever been. We've got a talented work force. You know, this is where our people want to live. This is where we want to be. We've had a great partnership with the State of Washington. I hope its one that continues for a long long time to come. Again, I preface it by – or caveat it by saying that it is gonna be a much more competitive environment out there in the future. And work *anyplace* is not an entitlement.

Dominic	Sounds like if you can fix things with the machinists then the outlook for here looks an awful lot rosier.
Albaugh	I sure hope it does. That's – I'm gonna be here a few years, and I would like nothing better than to get a great contract with the Union and put to bed the concern our customers have about our ability to deliver on the promises we make.
Dominic	You mentioned the engineers here. I want to talk about that. One of the things you did when you came here in October, you established an advisory group. The old-time Boeing people. People like John _____, Joe Sutter, _____. People associated with the old style of Boeing. And then in January Boeing elevated nine engineering leaders to the move that was spun as harking back to the early days when aerospace companies were driven by engineering culture. So I want to ask you, you are an engineer? You started as an engineer. Is that a specific goal to reinstate the primacy of engineering with in BCA?
Albaugh	I think decisions need to be driven more by engineering and less by the, what I'll call the business decision-makers. I think on the 787 program we made some decisions that took on much more risk than we should have taken on. Some of these outsourcing decisions were – we did not consider the extent – the risk that we'd take on by going outside. And I think that we are and we will make sure that the engineers and the voice of the engineers is much more involved in the decision-making as we go forward. Bringing the senior advisory group in – a lot of people left this company during the merger, right after the merger. And a lot of people left I think right after 2000, 2001 because they didn't see us developing any new programs. And we lost a lot of the heritage of this company. And going into the 787 program, we didn't have a large group of people that had ever been through a development program before. The great thing about the 747, the 787 is we're training a whole new generation of engineers and program managers on how to do development programs by bringing back Sutter and Roundhill and Quimalivin(?) and those icons in the Boeing company. We're getting the benefit of hundreds of years of knowledge and experience and they are people that I listen to, they're people that I want to get my team in front of so they can get the benefit of their history and the benefit of the things that they've done right and the things that they have done wrong over the years. You know, the whole issue of the iconic engineers. You know I started that with John Tracey in the old IDS organization. When I grew up, the sheriff in town was the chief engineer. You didn't do anything without getting the chief engineer on board. And if you didn't get him on board and you were wrong, it was not a good situation. And I pushed John very hard that we needed to elevate the iconic engineers in this company. They needed to get more recognition. They needed to be more involved. And with some of the changes that we made by promoting the eight or nine vice presidents into engineer, I think, into engineering does that.

Dominic	Another aspect of the relationship with your engineers is your relationship with another union which is SPEEA. And it does seem to me that that relationship has been adversarial for awhile. If you want to elevate engineers, why so adversarial with SPEEA.
Albaugh	Yeah well, I don't have all the history. You probably know more about it than I do Dominic. This place doesn't run without engineers and it doesn't run without machinists. And I think that what we need to do with our engineering organization is be real clear about what part of engineering do we want to do here. And I think what happened with the 787 was we outsourced things without explaining to the engineering community why. And one of the things that I sat down with our new chief of engineering, you know Mike Delaney, is we need a strategy – what are those things, what is that IP that we're gonna do here. What are those tasks that only the Boeing company understands the things that we need to hold close. The flight controls – never outsource that. The wings -- never outsource that. The fuselage, the composites – don't outsource those. We need to define very clearly things that we should do and have to do and those things that anybody can do. And those things that we need to do to hold on to our IP, we need to build the walls around those very high. And I think we need to go and communicate to the Union of SPEEA and the Union, IAM Union. What are those things that we want to hold close and hold dear. We outsourced too much.
Dominic	Yeah, well, I definitely want to talk about that. You just said you never outsource the wings. Isn't it too late, you've already outsourced the wings to Japan.
Albaugh	Well we have. We'll build other airplanes.
Dominic	So Mitsubishi is not gonna be building ....
Albaugh	I didn't say that. I didn't say that. Those are examples. Those are examples.
Dominic	Well actually you and Mr. McNerney have talked repeatedly in various venues about this issue and what you said is you're gonna draw the lines differently. That's the phrase that you use. And I'm wondering if you could just elaborate a little bit on what that means. In particular, for example, I understand its already happening in the 787–9, the second version of the 787 – that you are outsourcing less of it than you did on the dash 8. But how exactly, I mean the wings are still being made in Japan, fuselage in Italy.
Albaugh	We lost control of the design. We lost control of the interface. We didn't provide enough oversight to the subcontractors that were doing the various elements of engineering and manufacturing. On the dash 9 we pulled some of that engineering back. As you know, we took over the Vought facility. We took over the Global Aeronautical Facility. So we now have control of some of the fuselage of the airplane. So we have pulled some back for both the

	Dash 8 and the Dash 9. Those lines that we're gonna have to redraw, we're in the process of redrawing those right now. If you look at a product strategy, the manufacturing strategy, an outsourcing strategy, an engineering strategy, all those are very interrelated, and we're in the process of defining those strategies right now.
Dominic	One thing that you did on the 87 was you not only had Mitsubishi build the wings in Japan, but you had them do the detailed design of the interior of the wing. And is that continuing on the Dash 9?
Albaugh	I believe it is. Its not the same wing, the new wing. It's the same length, but it's a stiffer wing and its got – it carries more loads. So it's a different wing. I think that they're still doing the wing design on the Dash 9. We can check that for you.
Dominic	But, you know, given what happened with the 87, then I think I read what you just said as an admission that it didn't work very well and that you did make mistakes in outsourcing the work.
Albaugh	We learned a lot.
Dominic	And you paid for it. You've had two years delay. So isn't that an argument for some surprise that despite that Boeing is nevertheless insisting that the 787 supply-chain model is the one for the future. You draw the line slightly differently, but you'll stick to that model. Why, when it didn't work so well? Or how do you change it to make it work?
Albaugh	Its really easy in hindsight to second guess decisions that were made. And I think they made a lot of good decisions on the 787. One that they got the airplane right. I mean this is gonna be an airplane that's very efficient. This is gonna be an airplane that I know people are gonna want to buy. And this is gonna be an airplane that changes the way people travel and changes the way that airplanes are built. But, I think we outsourced elements of the airplane to people that didn't have a lot of experience at it. We didn't provide them the kind of oversight and support that was necessary. And we lost control of some of the interfaces. So what do we have to do differently or better going forward. Well, again, we're gonna redraw those lines and we have to treat any subcontractor in the future as an external factor, as an external design team. We need to look at them as more than just a company that we throw a specification over the wall to. We need to be much more – but I think that if you talk to me, if you talk to Jim McNerney, we'll both say that we moved up the value chain too far and we took on too much risk.
	END OF FILE 2
FILE NO. 3	

Dominic	Well, I think that strategy is in part connected with what had been a mantra at Boeing for some years including at IDS where you were meeting which was that Boeing was shifting towards large scale systems integration.
Albaugh	Well, actually it's a little different at IDS you see. We, yeah, complex large scale systems integration is what this company does. At IDS, this whole idea of best of industry and being integrator was not an act of inspiration, it was an act of desperation, you know, we didn't have any verticals. We weren't vertically integrated to begin with. And that was a strategy that we put together because we had no other at our disposal other than to go out and buy a bunch of companies to get vertically integrated. I think the difference over here, is they started off being reasonably vertically integrated and moved up the value chain. And I think in hind sight, we probably moved up a little too far.
Dominic	Well, some people definitely saw that, if we confine ourselves to speaking about BCA, saw this strategy as a move away from the actual building of the airplane towards a more architectural, conceptual approach early in the stages, doing the market analysis deciding the _____ and architecting it. And, of course, final assembling it. But final assembly was relegated to a snap-together airplane, in theory, at least it hasn't worked out quite like that. But the actual building of the airplanes here in Puget Sound factories was something that was less important. It was work that seemed to be designated lower level work that other could do. Is that the way it goes in future or is that…
Albaugh	See, I would not subscribe to that, you know, my view is there's certain things that you have to keep within your company, you know, those pieces of intellectual property that nobody else in the world understands or knows how to do. And those are things both from a manufacturing and design standpoint that you need to keep in sight. And then there are other things, seats, galleys, some of the, much of the machining, you know, anybody can do those things. But why do people come to you? They come to you because you understand things better than anybody in the world understands about airplanes. And we need to define what those things are, and we need to hold those things very close. You know, the other issue that I feel pretty strongly about is if all you're doing is systems integration, I mean, how do you train the engineers of the future to be systems integrators. I mean, I think engineers need to come in and design something. They need to design a part. They need to see how a part goes into a subsystem, how a subsystem goes into a system and how systems of systems interact. You have to have some degree of basic design so you can train the systems integrators of the future.
Dominic	I have too much of that so that the engineers here didn't have enough to, so the things you want to protect include the wings?

Albaugh	I think we understand how to build wings as well anybody in the world, and I think we're demonstrating that. In our 737 program we're, you know what? I guess building 62 wings a month. That's pretty good production.
Dominic	Alright. Good. Well, the question about your own taking over at BCA, it seems to me looking on from the outside, that you have approached your job, your new job, eager to shake things up. After some months of review, you have a major management shuffle of putting different people in different place. You organized your management retreat and got everyone on the same page. So I'm just wondering, it does seem that you are, in some sense, about change. And what needed changing and what's ahead?
Albaugh	Well, I guess first of all, I didn't see that management shake up that we had as being that dramatic, you know, what did we do? We formed an organization called Program Management to ensure that we bring the program management and execution discipline necessary to all the programs. And we put them under Howard Chambers, somebody that's been doing development programs for 40 years. I also had a view that we were focused a lot on 787 and 747 and appropriately so. But at the same time, I had a view that we had to be thinking, you know, longer term. What do we need to do on the single aisle airplanes? What do we need to do in terms of upgrading the Triple 7 or a brand new Triple 7 size airplanes? And that's I asked Mike Bair to go focus on the new single aisle airplane or an upgraded 737, and you say, why Mike? Well, you know, Mike got the configuration of 787 correct. And he's very good at that. And he's very analytical in his thinking, and I know that the decision we make on the 37 will be the right one. And then we took Lars Anderson and talked him into coming out of retirement and asked Lars to focus on Triple 7 next generation or a new 300-400 seat airplane. And Lars was good enough to come out of retirement to do that. So I would say this reorganization was really about finding the future, but also bringing more discipline to how we execute existing programs. Most of the key players and the program managers, they didn't change. We had a couple of people retire, so we moved some people around. But I would not call that a major change in the organization other than to focus on the future and the program management discipline. You know on the offsite, I'm not a new guy on the block, and I felt the whole team, all the executives needed to understand what I felt was important. And what I tried to achieve for that meeting was to get alignment of the entire staff on and where we needed to go, what the challenges were, what the issues were, and what we all needed to do together. And there are really only four things. I try to keep things pretty simple for the team. What we have to do is, we've got to continue to add value to our customers, that's why they keep coming back. We need to find the future for the Boeing Company. We need to develop the leadership team of the future, and we need to meet the plan. And those are the four things that we talked about.
Dominic	The appointment of Howard Chambers to oversee program management, that's specifically, I think, just to manage projects. It does seem that the perception

	is Boeing has failed in that here or over a couple of years. You see, I haven't kept control of the program.
Albaugh	Yeah, it's interesting. I think that BCA is extraordinary in their ability to manage programs. And I don't think anybody manages a supply chain as well as they do. Just the fact that we're doing 31½ 737s a month, and we set a record last year with 88 Triple 7s being delivered, do a great job of program management on production programs. I think the issue was on the development programs, the fact that we hadn't done a major development program in a long, long time. The fact that a lot of the people that had, had retired. And some of the decisions we made on the program were business-driven as opposed to being driven by the engineering community. And we just took on too much risk.
Female	_____ program management and ideas. The program management is really an essential function and discipline.
Albaugh	Yeah, at IDS we had 300 programs, and the vast majority of programs are development programs, you know, an ABL program, that's all it is, is a development program. I mean, the space station was a development program and went on for 10 years. The Ground-Based Midcourse Missile Defense program was a test bed. It became a development program and finally we're installing it. But how you do program management and development programs is something that Howard understands very well, and I think I understand pretty well. And we're trying to bring many of those disciplines to the BCA side. At the same time, we're trying to bring a lot of the talents that BCA has, relative to supply chain management, you know, over to the IDS side. So, I mean, there's great synergy within in this company. And, you know, one of the things I hope to achieve being over here is to encourage even more of that.
Dominic	You talked about potential competitors in the future. I'd like move on and talk about China. I believe you're making a second trip to China or have you just made it?
Albaugh	I think I'm going the last week of this month, yeah.
Dominic	And that's your second trip, right?
Albaugh	Yeah.
Dominic	So, I find it interesting, Boeing like the United States itself, has an ambivalent view of China's enormous growth. It's off of the trade as a potential massive market which also portrayed as a potential threat. And when you were head of the defense side of Boeing, perhaps you had to view China one way. Now you're head of BCA, you're making trips to China to sell airplanes. So recently the U.S. sold arms to Taiwan, which resulted in the threat from China

	to boycott any companies involved including, Boeing had a small part in that, the missiles. Then the last week there was a Wall Street Journal piece saying that we should build more F-22s which of course, Boeing knows a big part of here in Seattle because of the potential threat from China one day. So the question is, how do you, in the position you're in now, how do you handle this complex relationship between the U.S. and China, and between Boeing and China?
Albaugh	Well, you know, I'll tell you there's not a lot that the Boeing Company can do about the relationship between China and the United States. I mean, the decision to sell arms was country-to-country. It was not a decision with the Boeing Company in any way got involved in. I think the only thing that I can do is try to be the best customer to the Chinese airlines and the best partner to some of the joint ventures that we have in China that we can be. I don't worry a lot about things I can't control. What I can control is the relationship that we have with the airlines in China. And we're going to work very hard on those. You know, China is going to have a GDP as big as ours within the next 20 years. It's an economy that's going to need airplanes. They're developing 34 new airports right now, large airports. We're developing one here in the United States. They're going to be buying about 200 airplanes a year for the next 20 years. It's a big market for us. They're going to building their own airplanes. And I have full confidence that they'll build a very good airplane, maybe not the first time, but eventually they'll get it right. And I spent a lot of time in space business, so I know that going to outer space is a difficult thing. You've go to from zero to 22,000 feet in 8½ minutes with 2,000 feet per second in 8½ minutes. They did it a lot faster than anybody thought they could. They have made a national commitment to building commercial airplanes. They're going to invest billions of dollars in developing that capability. They have, you know, many, many times as many engineers coming out of their colleges as we do. And they're going to develop a good airplane over time, so, you know, we have to figure out and working very hard on what kind of relationship do we want to have with industry over there. And what kind of relationship do we want to have with the airlines in China.
Dominic	So how much of a threat is the C919 narrow body jetliner that they're developing that's supposed to be, I think, 180 seats, approximately. Suppose to enter service a 2016. How big a threat is that to Boeing?
Albaugh	Well, they're going to put some of the new engines on them. And, you know, they're more efficient engines. And assuming they get the airplane right and it probably won't be perfect the first time through. They could have an airplane that competes with a 737, yes.
Dominic	And what do you do about that?
Albaugh	Well, we need to do several things about it, one, the Boeing Company gets a premium for the airplanes that they sell. And we get a premium on the

	airplanes that we sell because we create value for our customer and that's one of the assignments that Mike Bair has, you know, what does the next generation 737 or the next generation single aisle airplane look like? Is it a re-engined 37, next generation, or is a brand new airplane? And we're actively looking at both of those options right now. And we're looking at having a capability, you know, towards the end of this decade. And it's not just the Chinese; it's also the Canadians with the CSeries. It's also, you know, Bombardier, it's also Embraer who will have an airplane and potentially the Russians as well.
Dominic	So where do you stand on this as part of the national debate, I think people would be interested to know what the Chief Executive of Boeing thinks in terms of this threat or market which is China to the U.S. Is it a military threat or is it a vast market we need to tackle?
Albaugh	Hey, you're not going to get the head of commercial airplanes talking about China's military threat, you know, Dominic. Again, I'll leave that to the people of the Pentagon, and I'll leave that to the policy makers in Washington, D.C. You know, you think about China and the United States, our economies are dependent on each other, now, and will be for the long haul. You looked at how far this relationship has come over the last, I guess it's 35 years since Nixon first went over there, and I think everyday we get closer and closer together. Our economies get more tightly entwined. It's not to say that we don't have the periodic bump in the road, and yes, we're having one of those right now. But I think there's a lot to be lost on both sides if we don't have a good relationship with China. And I think that China has a lot to lose if they don't have a good relationship with the United States.
	END OF FILE 3
FILE NO. 4	
Dominic	You know, Boeing's first engineer was Chinese born Wong Tsoo. And it's been noted before that for a global company, Boeing's executive ranks don't, have a surprising lack of diversity. I look, for example, at your Indian operations, and I see the success Dinesh Keskar has had there, Indian born executive and president of BCA in India. But I don't see that in China, there's very few Chinese American executives which is a little surprising given that we're in Seattle, we're on the Pacific rim, we've got a great Asian American community here. And think of the cultural impact of Gary Locke, the Governor of Washington, going to China and trying to help sell Boeing airplanes. How come you don't have more such faces?
Albaugh	Stay tuned. You'll be the first person we call, okay? And it won't be long and we'll give you a call.

Dominic	Okay, thanks. We're running out of time, so a few important topics to cover, one of them is tanker. You and other Boeing execs have talked about the unique Boeing advantage of building both commercial platforms and the military systems and how you leverage that. You did it for the Poseidon _____ that's built and rented. So you installed all the military's hardware in line on private assembly. Is that what's gonna happen on tanker if you win it? Will you do that in Everett?
Albaugh	We will do as much as we can in Everett. We'll make all the structural modifications that we can. We'll install some of the mission-specific equipment that we need to make it a tanker. But the hoses and the drogues and the bladders, some of those things will be stalled, installed in Wichita. But as much as we can install upfront in line, you know, that will drive the cost of doing business down. And that's what we plan on doing.
Dominic	Well, the tanker RFP that just came out on, in the estimation of outside observers puts you in the favored position to…
Albaugh	You know I'm very intrigued by that. You know, it's very hard to write an RFP for dissimilar airplanes. You know, I think the U.S. Air Force did a pretty good job of doing that. I mean, there are things in that RFP that we don't like, and, you know, I understand from what I read in the paper there are things that Northrop doesn't like, but it's not a perfect RFP for either one of us and there are puts and takes for both. You know, I read that thing and, you know, I don't read it as a lay down hand for the Boeing Company. And I'm assuming that Northrop Grumman is gonna bid.
Dominic	Well, is there any sense of an embarrassment at the company that should you win it this time you've done it by a political backlash that caused them to rerun the competition?
Albaugh	I guess I don't understand. I don't think that there's political backlash that caused this thing to be re-competed. I think the GAO took a look at the decision-making process and felt that there were errors in how they came to the decision they came to. I mean, let's review the, let's review the tape here. We had 98 strengths, they had 30. We had one weakness, they had five. There was no credit to be given for fuel offload above a certain threshold level; they were given that. The GAO looked at the decision-making process and it was flawed. That's why they're doing the, the re-competed has nothing to do with politics.
Dominic	But the Congressional support that you have, you, way back as early as the early 2000s were...
Albaugh	You know, I appreciate Congressional support, but I don't think there's been a competition that I've been involved in in my career that has been decided by people on Capitol Hill. They get, it gets decided by the procurement people in

	the Pentagon based on their RFP and where they don't make their decision based on the RFP, new companies have the opportunity to protest, which we did and which we do very infrequently and they found in our favor.
Dominic	One political issue that's come into the whole tanker debate is WTO and I'd like to go to that now.
Albaugh	Yeah.
Dominic	The WTO found Airbus guilty of taking illegal subsidies and an outcome in the European countersuit is expected this summer, which could find similarly liable, maybe, maybe not. But what I want to ask you is this; Embraer and Bombardier went through this whole thing suing each other at the WTO for illegal government launch subsidies, they were both found guilty and it didn't change a thing. Nothing happened and, you know, Bombardier's making the CSeries now and they're getting government money to help do it. So what's the point? What, why, where can these WTO suits go?
Albaugh	Well, you know, first of all, you got to remember, Dominic, that we didn't bring the WTO suit. The administration of the United States of America brought that suit.
Dominic	They wouldn't have done so if you didn't want it.
Albaugh	They brought the suit because in their view the United States and its industries have been damaged by illegal subsidies who were in violation of the WTO rules and that's why the lawsuit was brought and clearly the administration feels that those subsidies were illegal and the WTO feels the same way, at least that's their, the preliminary judgment that they've laid down.
Dominic	Well, certainly some people see it as politics...
Albaugh	Well...
Dominic	...to block, in part it helps to try and block the tanker.
Albaugh	So, you know, we're building the 787 the old-fashioned way; we're using our own money. On the 7, on the 8330, you know, based on the WTO case, you know, they had launch subsidies of close to $6 billion. You know, that's a significant advantage for them that we don't enjoy. You know, we have to cover our own costs. And, you know, we would've liked to have seen something in the RFP that accommodated the launch subsidies that they got. It's not there and we're competing, we're not crying foul, we're gonna do the best we can with the proposal.
Dominic	Do you have any expectation about the outcome of the countersuit, which is ending this summer where Boeing was accused of illegal subsidies?

Albaugh	Based on everything I know, I feel pretty good about the outcome. Of course, then again, Dominic, I thought we were gonna win the tanker contest last time. As I've told people, there's only one more, one person more surprised that we lost the tanker than me and that was Ron Sugar, that they won.
Dominic	You mentioned earlier in this conversation that being number two in a duopoly put you in last place and you don't want to be in last place. So since we're discussing this rivalry with Airbus, where do you see that, how do you see that playing out in the next few years?
Albaugh	When we start delivering the 787s in quantity and that's gonna start in 2012, 2013. You know, we should, you know, take the number one position, you know, relative to airplane deliveries. We ought to overtake them in 2012, 2013, that timeframe. But I think, you know, longer term, it's easy to get the most orders and it's easy to make the most deliveries, all you have to do is just give the airplanes away. We're not gonna do that. If I look out, you know, 10 years from now, we're gonna have a brand new 47, we're gonna have a brand new 87, we're gonna have a major upgrade to the 737 or a new small airplane and we're gonna have a major upgrade to the triple 7 or we're gonna have a new 300 to 400 passenger airplane. I mean, we're gonna have a whole new set of products in the marketplace and these are products that are gonna create great value for our customer and when you create value for the customer you're gonna sell airplanes and we should be number one for a long time to come. And you know why we're gonna be number one? It's because of those 75,000 people here in Puget Sound that get up in the morning and put their badge on and walk to the, through the doors. I mean, those are the people that make it happen. And I could go tomorrow and they could replace me pretty quick, but it's the collective knowledge of our team that allows us to do the things that we do and they're the ones that'll make it happen.
Dominic	There's an expectation of restraint today in corporate the executive bonuses, Boeing, a lot of Boeing's money, half of its revenue comes from the government and your laying off thousand of people right now, but you've got a special $3 million bonus on top of your regular bonus for staying, for switching jobs. How is that justified?
Albaugh	No, they didn't, they didn't make me any promises when I came here and I didn't ask the board of the comp committee for this and I certainly appreciate, you know, what they've done, but it's not something that I asked them to do and, you know, I do intend to continue to work here as long as the company will let me stay.
Dominic	Do you understand why it doesn't look good to workers getting laid off when executives get million dollar bonuses?
Albaugh	Well, my job is to make sure that workers don't get laid off and I think that I've got an unwritten bond with the employees that my job is to profitably

	grow this place. I mean, at the same time I'm asking them to be more efficient, that allows us to sell our planes for less, that allows us to sell more planes, that allows us to create jobs or at least keep the level of jobs at the same, at the same number that it's at today and that's what I think my job is.
Dominic	Okay. I'm gonna stop there.
Albaugh	Okay.
Dominic	Thank you very much.
Albaugh	Alright, Dominic. Thanks.

Chairman ISSA. The gentleman from Iowa, Mr. Braley, is recognized.

Mr. BRALEY. Well, what Mr. Ross said, and it is in the record, is the NLRB is an arm of the U.S. Congress, which is blatantly false. It is part of the executive branch. And when they are performing an adjudicative function, it is a quasi-judicial proceeding, and that is why we have been talking about due process throughout this hearing.

Thank you, Professor Getman, for not convicting Boeing on the basis of the very tiny record we have been talking about here today. And I said at the beginning of this hearing that if you remember one thing about what is going on here today, remember due process.

Because there has been many people talking about this as being a baseless complaint. Well, folks, if you remember anything about due process, think of all those Western movies you have seen where a posse has cornered a horse thief, and somebody in the posse says, "Let's hang him." And the sheriff says, "No, let's give him a fair trial, and then we will hang him."

That is not due process. And we are not here today to substitute our judgment for the NLRB, and that is what is wrong with this proceeding. Now, since Mr. Kucinich brought this up, let's take a look at the statement by Mr. Jim Albaugh that was made on March 2010 to the Seattle Times. Can we play that now?

[Video playing.]

Mr. ALBAUGH. [On video.] But again, the overriding factor was not the business climate, and it was not the wages we are paying people today. It was that we can't afford to have a work stoppage every 3 years. We can't afford to continue the rate of escalation of wages as we have in the past. You know, those are the overriding factors.

[End of video.]

Mr. GOWDY. Would the gentleman yield?

Mr. BRALEY. Now, Mr. Solomon——

Mr. GOWDY. Would the gentleman yield?

Mr. BRALEY. I only have 5 minutes, Mr. Gowdy, and I want to complete this. I will not yield.

Mr. GOWDY. I am happy to stop the clock.

Mr. BRALEY. I will not yield. I will not yield.

Mr. GOWDY. Will you put the remainder of the document in evidence under the rule of completeness?

Mrs. MALONEY. You can't stop the clock. You can't—you are not the chairman.

Mr. BRALEY. You will have an opportunity. Mr. Chairman, I would ask for order.

Chairman ISSA. I would advise the gentleman that by unanimous consent, the entire document is in the record. We will also post the entire video on the Web site.

The gentleman may continue.

Mr. BRALEY. And can I have all of my time reinstated, Mr. Chairman?

Chairman ISSA. You have all your time. One of the things that we do back here real well is they actually stop when that kind of stuff starts. So they will continue as you now continue.

Mr. BRALEY. Great. Now one of the things that we know, Mr. Solomon, is that there is a huge difference in the law between discrimination and retaliation, and I want to make that clear as well. Because if you are discriminating against an employee on the basis of race, religion, sex, gender, some other protected classification, that is a violation of the law.

And yet, if you retaliate against that employee because they engage in the process of protecting their rights by filing a complaint, that is a separate and distinct violation, is it not?

Mr. SOLOMON. Correct.

Mr. BRALEY. And so, when you are bringing a charge against Boeing for retaliation, that has nothing to do with the underlying action, but whether, in fact, this video and other evidence you plan to present at that hearing will provide a legitimate basis to prove that Boeing took the action it did because of a desire to retaliate against protected employees. Isn't that correct?

Mr. SOLOMON. That is correct.

Mr. BRALEY. Now, Mr. Miscimarra, you had a great comment in your statement, and you said there is not yet an evidentiary record in the Boeing case. And that is really what part of the problem is here today, is it not?

Mr. MISCIMARRA. The process certainly contributes to the problems that everyone is talking about.

Mr. BRALEY. Right. And you, in fact, made the comment that you greatly respect the members of the board, the acting general counsel, and others employed at the agency, a fact that is—or a feeling that is apparently not shared by some of my colleagues. But one of the things you mentioned at the conclusion of your wonderful appellate brief, which has 79 footnotes. I believe that is a new record for an opening statement, Mr. Chairman. It was eloquent and well argued.

You happened to mention the Dubuque Packing Co. case. And my wife grew up in Dubuque, IA, in a working class home built by her father just down the street from the Wahlert family mansion that owned the Dubuque Packing Co. Now is the Dubuque Packing Co. in existence today?

Mr. MISCIMARRA. I don't know the answer to that question.

Mr. BRALEY. It is not, sir. It is gone with the wind. A company that used to employ 3,500 employees, pay a payroll of $20 million in the 1960's and, Mr. Chairman, won the gold medal for the best canned ham at the California State Fair in 1960 and 1961, a fact I knew you would appreciate, is gone. And that is what the National Labor Relations Board is all about, is protecting the rights of workers and employers and providing a fair process.

Now that process may take too long, and I wouldn't disagree with you on that. But we know that people like Judge Merridge in the Northern District of Virginia were successful in significantly decreasing the amount of time it takes to process contested cases if they really put their mind to it.

So rather than complain about the length of time and the burden on the employer, why not just improve the process so that it is fair and more responsive to the needs of everyone?

Chairman ISSA. The gentleman can answer briefly, but his time has expired.

Mr. MISCIMARRA. Yes, the only thing that I would say is there are also issues that I and others think are significant in relation to the interpretation of law and the remedy being sought in the case.

Chairman ISSA. With that, we go to the gentleman from South Carolina, Mr. Wilson. And would you yield for just a quick moment?

Mr. JOE WILSON. Certainly, Mr. Chairman.

Chairman ISSA. Thank you.

Mr. Solomon, since we discovered that everyone seems to be citing this video, both in print and writing, would you agree to try to get the entire testimony on your Web site? We have discovered that only the one line being quoted here and not the rest of this gentleman's comments are on your Web site.

Would you attempt to make that record complete on your own Web site for information purposes?

Mr. SOLOMON. Well, Congressman, I think that what is on our Web site is what is quoted in our complaint. That is, again, just notice pleading, and I would respectfully say that all of this is going to come out at the hearing.

Chairman ISSA. Okay. So if you are declining, I will say that the House's Web site at the Oversight Committee will have the entire interview with all of its various offsetting lines that I am sure Boeing will bring up in their defense.

The gentleman is recognized.

Mr. JOE WILSON. Thank you, Mr. Chairman.

And Ms. Ramaker, I want to thank you for your courage to be here today. You provide a human face of what I believe this is about, and that is, as you indicated, denying your ability to have a job, your ability to choose your job.

I want to thank you for pointing out that you are talking about possibly 3,800 jobs, 3,800 families could be affected. Actually, it is really 9,000 jobs with construction and suppliers throughout the State of South Carolina.

I want to thank you, too, my colleagues needed to know that the facilities are in place. A 1.1 million square foot facility has just been completed. There are other buildings. These buildings can only be used for aircraft manufacture. And as the Seattle Times editorialized on Monday, the money has been spent, over $1 billion, by Boeing, by the people of South Carolina.

And Mr. Whitman, I want to thank you for your efforts of giving opportunity to the people of South Carolina for jobs. Can you tell us what these jobs are, and what is the pay scale?

Mr. WHITMAN. We supply a broad spectrum of jobs in response to Boeing's needs for contract staffing. We have people who monitor safety, part of the safety program there, all the way through graduate engineers. The pay scale is anything from $15 to $55 an hour.

Mr. JOE WILSON. And so, these are great opportunities for the people?

Mr. WHITMAN. They are. These jobs pay well above the local average. And again, we're a contract agency, but we also provide an entry point for many people to join Boeing as full-time regular employees. And that happens all the time.

Mr. JOE WILSON. And we have, sadly, record unemployment in South Carolina at this time.

Mr. WHITMAN. We do have record unemployment. I can tell you for any time we post a job, we have literally hundreds of people apply for every single job that we post out there. Sadly, they're not all qualified, but that's the state of things right now in the market.

Mr. JOE WILSON. And Mr. Solomon, the people of South Carolina, a huge majority, have really been shocked at the level of influence and power of unions in our country. Earlier this year, a union out of Washington sued the Governor of South Carolina for comments that she made in support of the right-to-work law.

And I am just a real estate attorney, but I was startled. I thought we had free speech, and I really thought that public officials could make statements that they believed. But she is being sued, her right to speak.

And then, sadly, earlier this year, you announced that you would be suing the people of South Carolina, or could, along with Arizona, Utah, South Dakota. Each one of these States had a referendum last year to amend the constitution to provide for secret ballot.

Of all the States that I mentioned, I am very proud South Carolina was number one. Eighty-six percent of the people of our State voted to have secret ballots, Democrat and Republican. And it is just shocking to think that such a lawsuit could be filed.

And then we are here today. Where I have been working on economic development all my life, it never occurred to me that the Federal Government could intrude and deny jobs to the people of our State. What would you say, what advice do you have to people who are the—1,000 people who have already been employed, the thousands more that may be employed, what advice do you have to them as to what they should do in the future?

Mr. SOLOMON. I think that, you know, Boeing is free to use the South Carolina plant any way it sees fit for nondiscriminatory reasons. We have not asked to close the South Carolina plant. As I have said repeatedly here, that the allegation or the remedy that is sought in the—in the complaint is only the beginning of the conversation, and Boeing will have every opportunity to say that if they can establish that the moved—the second line to Washington State would be unduly burdensome that the judge will make a decision, and the board and the courts will make a decision.

But if I could, as to the preemption suit, I would like to say that the National Labor Relations Board loves secret ballot elections. The problem is that the amendment that passed said that the only way employees can become unionized is through a secret ballot election.

And under our Federal law, that is not the only way that employees can choose union representation. And as a result, the amendments directly conflict with Federal law and are, therefore, preempted. And I have no choice but to file these suits.

Chairman ISSA. I apologize. The gentleman's time has expired.

Mr. Scott.

Mr. SCOTT. Thank you, sir.

I just have a few questions. For the sake of redundancy, I want to just clarify a couple of definitions. I know, Mr. Miscimarra, you

are not a grammarian necessarily. But please help me with some definitions here.

Mr. MISCIMARRA. Sure.

Mr. SCOTT. The first definition I want is the definition to transfer. Part of this suit is about transferring assets from one location to the other location, and I keep hearing Mr. Solomon talk about transferring back the second line.

Can you help me with the definition of "transfer of assets?"

Mr. MISCIMARRA. Well, for purposes of Section 8(a)(3), the conventional—what we see in the cases with alleged discriminatory transfers, work or equipment moves from point A to point B.

Mr. SCOTT. Work or equipment. And the whole notion of losing jobs in one location to the other location, can you help me with the definition of "created" versus "transfer?" If you transfer assets and you transfer jobs, isn't that different than creating assets and creating jobs?

Mr. MISCIMARRA. I think, although I am no grammarian——

Mr. SCOTT. Of course not.

Mr. MISCIMARRA. My interpretation of to refer, for example, to the Boeing situation——

Mr. SCOTT. Yes.

Mr. MISCIMARRA [continuing]. If employment is increasing in South Carolina and employment is also increasing in Washington State, I am not aware of any cases that would suggest that constitutes a transfer.

Mr. SCOTT. Mr. Solomon, the complaint alleges that Boeing decided to transfer its assets or its second line for the 787, for the Dreamliner, from Puget Sound to North Charleston. Is that correct?

Mr. SOLOMON. That's correct.

Mr. SCOTT. But as I understand it, this second 787 Dreamliner, the assembly line, did not actually exist in Puget Sound. Is that correct?

Mr. SOLOMON. That is correct.

Mr. SCOTT. So how do you transfer assets that do not exist?

Mr. SOLOMON. The theory of our complaint is but for the unlawful motivation of Boeing——

Mr. SCOTT. Yes, sir. Let me ask the question one more time.

Mr. SOLOMON [continuing]. They would have built the second line in Everett.

Mr. SCOTT. Let me ask—you have said three times today "transfer back the second line." How do we transfer assets that simply do not exist? Can we, in fact, transfer an intangible that doesn't exist back to a place?

Mr. SOLOMON. The second line does exist.

Mr. SCOTT. It exists now, but did it exist in Washington State?

Mr. SOLOMON. No.

Mr. SCOTT. So can you transfer, can you literally transfer back something that did not exist there?

Mr. SOLOMON. The—you know, I would say that you're—you're overparsing the word "transfer."

Mr. SCOTT. I am assuming——

Mr. SOLOMON. The theory of our complaint is that the second line would have been built in Everett, absent the unlawful discrimination.

Mr. SCOTT. So we can't really agree on the definition of transfer or assets or tangible or intangible.

Mr. SOLOMON. Yes.

Mr. SCOTT. So did Boeing transfer any jobs then from the existing location in Washington State to North Charleston? The key word being "existing."

Mr. SOLOMON. Not at this time, but there is the possibility that as planes are built in North Charleston, that those planes would not be built in Everett.

Mr. SCOTT. The general counsel of Boeing, Michael Luttig, wrote you a letter on May 3rd, and he explained their decision to build a new, a new assembly line. So a new assembly line would not be the same as transfer. Is that accurate?

Mr. SOLOMON. Again, I don't think that this parsing of definitions is going to get us anywhere. Boeing has a different view of this case than we do, and they will have ample opportunity on the record to present the facts as they see them.

Mr. SCOTT. Mr. Solomon, as I am not a lawyer, I just want to work on definitions. Because if your case is built on the fact that Boeing transferred assets from one location to another location that never existed at the first location, it is really difficult for us to digest that we are actually having a real conversation about the transfer of assets.

And if no one lost their job in the first location, it is really hard for us to digest the fact that 1,000 employees and a $1 billion investment in the second location has anything to do with not the loss of, but the actual creation of more jobs at the first location.

So it is really hard for us to digest, as non-lawyers, how, in fact, we have a case, which we consider baseless, because if you are not really transferring assets from Washington State to North Charleston, you are not really losing any jobs in Washington State because of North Charleston, then where is the base of the case?

Mr. SOLOMON. The case, I'll try again, that the second line——

Mr. SCOTT. Yes, sir. Please. I am just trying to figure it out.

Mr. SOLOMON [continuing]. Would have been built in Everett and not in North Charleston.

Mr. SCOTT. How do we know that, though?

Mr. SOLOMON. That is the theory of our complaint. That is based on the evidence that we gathered.

Mr. SCOTT. So, Mr. Luttig, the general counsel for Boeing, simply said that they were creating a new line. So, from a competitive perspective, from a competitive perspective, is it not good to have dual locations perhaps?

If, in fact, the threat of a shutdown allows for them to have dual locations, do we not find ourselves in a more competitive environment for our goals of creating larger exports from this country to other countries? And if we are——

Mr. SOLOMON. A company is free——

Mr. SCOTT [continuing]. Actually going to create new jobs in Washington State and new jobs in South Carolina, I don't understand how we arrive at the conclusion that simply someone has

been harmed because there were no assets that were tangible to move from one location to the other location, and there were no jobs that were lost, no union jobs were lost at the current location. And there were 1,000 new jobs created at the North Charleston location.

Mr. GOWDY [presiding]. The gentleman's time has expired. Mr. Solomon, you may answer if you would like to.

Mr. SOLOMON. I understand your position, Congressman, and my guess is that Boeing might well present your position. But right now, what we decided is that the decision to build the second line would have been built in Everett, not in North Charleston absent the unlawful retaliation.

Mr. SCOTT. So it is intangibles versus tangibles.

Thank you, Mr. Chairman.

Mr. GOWDY. Regrettably, the gentleman's time has expired.

On behalf of Chairman Issa, I want to thank all the members of the panel for your patience, for your time, for helping shed light on what is an important issue to everyone on the dais on both sides.

With that, we will take a brief recess and prepare for our second panel.

[Recess.]

Chairman ISSA [presiding]. This hearing will now come back to order. The chair now recognizes the second panel—the Distinguished and Honorable Governor of the State of South Carolina, Nikki Haley; the Honorable Alan Wilson, attorney general of South Carolina.

Pursuant to the rules of this committee, we ask that all witnesses be sworn. Would you please rise and take the oath?

[Witnesses sworn.]

Chairman ISSA. Let the record reflect that all witnesses answered in the affirmative.

Governor, Attorney General, you have only one problem with this wonderful facility, and that is that the amplification is limited, and you are facing away from the people around you. So, to the greatest extent possible, think of this as a rally—[laughter]—without microphones.

We now recognize the distinguished Governor of the State of South Carolina.

STATEMENTS OF NIKKI HALEY, GOVERNOR OF THE STATE OF SOUTH CAROLINA; AND ALAN WILSON, ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA

STATEMENT OF NIKKI HALEY

Governor HALEY. Thank you.

And thank you to the panel. Thank you for having us.

Welcome to South Carolina. For those that are visiting, we hope that you will come back often.

And thank you for allowing us the opportunity to speak with you today.

You know, the issue that we are talking about right now is not just a South Carolina issue. This issue faces every Governor in

every State in the country. And what I can tell you is what our story is.

In 2009, we were facing great challenges. We had high unemployment. We had poverty issues. We had budget issues, just like every other State. And we were blessed to see a great American company decide to look at South Carolina to come here.

And since that company has decided to create jobs here, we have seen a wealth of companies coming through here that have decided to come. And the reason they come to South Carolina is because the cost of doing business is low. We give them a great trained work force. Our quality of life is great. And we have companies that understand what it means to have a great relationship between their employers and their employees.

And so, Boeing decided to come here. They created 1,000 jobs, and it energized the State, and it energized our people in a way that we hadn't seen in a long time. And since then, we've seen lots of suppliers come in. We've seen the fact that Boeing, out of all the contracts they have, 91 percent of their contracts are with South Carolina businesses, which is a great testament to Boeing. It's a great testament to the businesses that it can create.

But what I have also seen is, as Governor, my job is to do whatever I can to create jobs. I never thought that the President and his appointees at the National Labor Relations Board would be one of the biggest opponents that we would have.

If you tell a great American company like Boeing that they cannot create jobs in South Carolina, all you are doing is incentivizing those companies to go overseas. And I am saying we can't have that. It's an attack on our employers in this country that are trying to keep business in America. It's an attack on the employees who appreciate the fact that they have jobs to go to. It's an attack on States that work hard to make sure that we keep the cost of doing business low, that we continue to have a pro-business environment, and that we do everything that makes America great.

And I will tell you that I had—was blessed to be able to attend the ribbon-cutting of Boeing last week. And before we even took the stage, I had an employee come up to me and say, "I love my job. This is the best job I have ever had. And I'm now set."

When I was speaking to the people of the company and to all the visitors that were there and after I got off stage, the number of employees that came and said, "Thank you for fighting for us. We love our jobs. We want to keep our jobs," it was overwhelming.

And so, what I would say is I wish this was being held in the Boeing plant because they would speak for me, and I wouldn't have to say a word. But what I will tell you is while South Carolina is the first State to deal with this, while Boeing is the first company to deal with this, this needs to be the last time we deal with this. If we are going to prosper, if our economy is going to prosper, we cannot allow a Federal Government or unelected bureaucrats to come in and start pushing their way in on our American companies.

As Governors, it makes it incredibly hard. For companies, it makes it incredibly hard. And we appreciate you taking the time and for your help in solving this problem.

Thank you.

Chairman ISSA. Thank you, Governor.
Mr. Attorney General.

STATEMENT OF ALAN WILSON

Mr. ALAN WILSON. Thank you, Mr. Chairman. I appreciate the invitation by you and this committee.

This hearing is about far more than Boeing or South Carolina. In fact, it's even more about the unions. It's about an individual's right to allocate capital in the way that they believe best serves their business.

As attorney general, it is my sworn duty, as South Carolina's chief legal officer, to defend our constitution, our State, and even our citizens. Fifteen attorneys general, representing both right-to-work and union States, have joined me in opposing the NLRB's complaint against Boeing. This complaint is without legal merit or precedent and threatens the company's $6.1 billion annual economic impact on South Carolina's economy.

The draconian remedy, as some have called it, sought by the acting general counsel would allow the board to choose where a private business may locate its capital. Neither the board nor the Federal Government should make private business decisions. It is business that creates capital. It is capital that creates jobs, not the Government.

Since its adoption in 1935, the National Labor Relations Act has never been so distorted that it would destroy a company's ability to make sound business decisions. The act imposes few constraints upon the free flow of capital to a right-to-work State. Legal precedents clearly demonstrate that Boeing's decision to expand to South Carolina is, in fact, lawful.

Boeing did not eliminate union jobs or remove work from Washington State. It merely created new work here in North Charleston. Under board law, it must be shown that existing work, existing work was eliminated, subcontracted, or relocated. In fact, even legal experts who support the board concede this action is unprecedented.

The board's audacity to file this complaint constitutes the shot heard round the business world. Companies around the globe are thinking twice about locating or expanding operations in this country, especially expansion into union States.

Based on this complaint and recent memos, the board appears anxious to challenge any business expansion it deems detrimental to unions as unfair labor practice. One can only imagine the chilling effect this will have on business leaders' desire to expand capital and investment in our economy.

Capital investment, as well as fundamental business decisions related to unionization, are not anti-union animus under Section 8(a)(3). While Boeing has not discouraged union membership in Everett, Washington, the Supreme Court has upheld legitimate business interest even though union membership may have been discouraged.

How could a rational person legitimately disagree with Boeing's decision when looking at South Carolina's business climate, its labor stability, and its $900 million incentive package? The acting general counsel's theory under Section 8(a)(3) that Boeing's actions

are inherently destructive of unionization is nothing but an attempt to thwart a company's fundamental business judgment.

That theory is inapplicable to Boeing's decision to expand here in South Carolina. In the words of the Supreme Court, a business may make a prediction as to the precise effects it believes unionization will have on its company. Such predictions, including those concerning work stoppages, are protected by the First Amendment.

Any claim by the acting general counsel that statements made by Boeing officials were coercive and, thus, violate Section 8(a)(1) are patently incorrect. The last work stoppage cost Boeing $1.8 billion and caused customers to question whether or not to buy from Boeing ever again. Despite this fact, Boeing desired, thank goodness, to keep production in Washington State. But despite that desire, the union refused to assure labor stability.

Furthermore, Boeing's collective bargaining agreement, which dates back to 1965, guarantees the company's right to determine where work is to be performed. The Supreme Court has recognized that management must have the flexibility to make business decisions without being second-guessed as unfair labor practice. The board is ignoring the rule of law in filing a complaint without precedent.

The consequences of the board's actions, despite its intent, would abolish a company's discretion to make those business decisions. In 1788, Alexander Hamilton warned that the freedom of the States can be subverted by the Federal head and such subversion is repugnant to every political calculation.

Our Founding Fathers went to great lengths to prevent an out-of-control Federal Government from nullifying private business decisions. We, too, must go to great lengths to ensure the Founders' promise is honored. The board's complaint is a step toward radically rewriting the NLRA. The board chairman has testified to Congress that she seeks to restructure the act as a collective action to redress economic inequalities.

Unless deterred, this bureaucratic agency's action will further paralyze our Nation's economy. Action must be taken in the halls of Congress. I ask this committee to join me and fellow attorneys general around the country in an effort to preserve economic freedom in America.

I thank you for this time, and I am happy to answer any questions that you may have.

[The prepared statement of Mr. Wilson follows:]

Prepared Remarks
South Carolina Attorney General Alan Wilson
House Oversight Committee
June 17, 2011

Thank you Chairman Issa and members of the House Oversight Committee for inviting me here today. This hearing is about far more than Boeing or South Carolina. It is about an individual's right to allocate capital in the way they believe best serves their business.

As Attorney General, it is my duty as South Carolina's chief legal officer to defend our constitution, our State, and our citizens. Fifteen Attorneys General, representing both right-to-work and union states, have joined me in opposing the NLRB's complaint against Boeing. This complaint is without legal merit or precedent and threatens the company's $6.1 Billion annual impact on South Carolina's economy.

The draconian remedy sought by the Acting General Counsel would allow the Board to choose where a private business may locate its capital. Neither the Board nor the federal government should make private business decisions. It is business that creates capital and capital that creates jobs.

Since its adoption in 1935, the National Labor Relations Act has never been so distorted that it would destroy a company's ability to make sound business decisions. The Act imposes few constraints upon the free flow of capital to a right-to-work state. Legal precedents clearly demonstrate that Boeing's decision to expand to South Carolina is lawful.

Boeing did not eliminate union jobs or remove work from Washington State, it merely created new work in Charleston. Under Board law, it must be shown that existing work was

eliminated, subcontracted, or relocated. In fact, even legal experts who support the Board, concede this action is unprecedented.

The Board's audacity to file this complaint constitutes "the shot heard round the business world." Companies around the globe are thinking twice about locating or expanding operations in this country – especially expansion to union states. Based on its complaint and recent memos, the Board appears anxious to challenge any business expansion it deems detrimental to unions as an 'unfair labor practice.'

Capital investment as well as fundamental business decisions related to unionization are not anti-union animus under Section 8(a)(3.) While Boeing has not discouraged union membership, the Supreme Court has upheld legitimate business interests even though union membership may be discouraged.

How could a rational person legitimately disagree with Boeing's decision when looking at South Carolina's business climate, its labor stability, and its $900 million incentive package?

The Acting General Counsel's legal theory under Section 8(a)(3) that Boeing's actions are "inherently destructive" of unionization is nothing but an attempt to thwart a company's fundamental business judgment. That theory is inapplicable to Boeing's decision to expand to South Carolina.

In the words of the Supreme Court, a business may "make a prediction as to the precise effects [it] believes unionization will have on [its] company." Such predictions, including those concerning work stoppages, are protected by the First Amendment. Any claim by the Acting General Counsel that the statements made by Boeing officials were "coercive" and thus violate Section 8(a)(1) is patently incorrect.

The last work stoppage cost Boeing nearly $2 Billion and caused customers to question whether or not to buy from Boeing ever again. Despite this fact, Boeing desired to keep production in Washington State, but the union refused to assure labor stability. Furthermore, Boeing's collective bargaining agreement, with the union, dates back to 1965 and guarantees the company's right to determine where work is to be performed.

The Supreme Court has recognized that management must have the flexibility to make business decisions without being second guessed as 'an unfair labor practice.' The Board is ignoring the rule of law in filing a complaint without precedent. The consequences of the Board's actions would abolish a company's discretion to make business decisions.

In 1788, Alexander Hamilton warned that the freedom of the states "can be subverted by the federal head" and such subversion "is repugnant to every political calculation." Our founding fathers went to great lengths to prevent an out-of-control federal government from nullifying private business decisions. We too must go to great lengths to ensure the founders' promise is honored.

The Board's complaint is a first step towards radically rewriting the NLRA. The Board's Chairman has testified to Congress that she seeks to restructure the Act as a "collective action to redress economic inequalities." Unless deterred, this bureaucratic agency's actions will further paralyze our nation's economy. Action must be taken in the halls of Congress, I ask the Committee to join me and fellow Attorneys General in the effort to preserve economic freedom in America.

Thank you, and I would be happy to answer your questions.

Supplement

The State, Wednesday, Jun. 01, 2011

Wilson: Silence is consent

By ALAN WILSON - Guest Columnist

The National Labor Relations Board's recent actions against Boeing and state labor laws amount to politics as usual: The president promised administrative action "to make sure that it's easier for unions to operate," and he kept that promise by stocking the NLRB with people who will do just that.

In April, the labor board filed a complaint to stop Boeing from expanding 787 Dreamliner production to South Carolina. The board has since issued a memo seeking to force companies to receive NLRB and union approval before moving a business unit. It also wants to sign off on state constitutional amendments. In May, it filed suit against South Dakota and Arizona challenging amendments guaranteeing the right to a secret ballot in union elections; it has signaled future litigation challenging similar amendments in South Carolina and Utah.

These actions jeopardize jobs and thwart economic development not just in right-to-work states such as ours but in union-friendly states as well. Why would a company want to locate to a union state knowing the federal government will block its ability to expand? The labor board's shortsightedness will not lead to an expansion in union membership, but instead cause an exodus of American jobs.

Bill Gould and Peter Schaumber, the NLRB chairmen under Presidents Clinton and Bush, respectively, have called the board's actions against Boeing "unprecedented." The National Labor Relations Act is being grossly misapplied. It does not allow the federal government to subvert private business decisions through bureaucratic overstep. The board's ill-conceived actions are frivolous and violate the rights of Boeing's stockholders and its employees.

The NLRB's leadership must remember that the agency was created to protect the rights of workers, not to wreak havoc upon prosperity and stifle job creation. When Boeing acquired Vought Aircraft in 2009, employees in Charleston exercised their rights under the law to "decertify," voting 199-68 to end their union representation. The board's actions would have the effect of nullifying that vote and subverting the will of the workers the agency was meant to protect.

The White House is dodging its responsibility in this matter by saying it does not "get involved in particular enforcement matters of independent agencies." But the labor board isn't really an independent agency. The president placed union representatives in NLRB leadership positions through recess appointments designed to circumvent the Senate's confirmation process.

These appointees have enforced their bias of labor-union longevity over private-sector prosperity. The president's silence is consent, akin to a parent in a grocery store refusing to control an unruly child. As a result, the labor board has been given the green light to wage war on commerce and industry.

Businesses understand how to create jobs. The government does not. In 1788, Alexander Hamilton warned the New York Ratifying Convention that the freedom of the states "can be subverted by the federal head" and such subversion "is repugnant to every political calculation." Our founding fathers went to great lengths to prevent an out-of-control federal government from meddling in private business decisions or circumventing constitutional amendments approved by overwhelming majorities of a state's voters.

Thankfully, the Constitution, specifically the 10th Amendment, prohibits such overreaches by federal authorities. Our founding fathers believed in a series of checks and balances to limit the federal government. If the president will not act when his appointees defy the Constitution, the states must.

As attorney general, I took an oath to defend the Constitution to ensure freedom and liberty are not eroded. Sometimes, that oath requires challenging the federal government. Unless deterred, bureaucratic agencies bent upon the destruction of capitalism will reduce America from greatness to mediocrity. That cannot stand. We must remember that America was made great by hard work and free enterprise.

Mr. Wilson is the attorney general of South Carolina.

http://www.thestate.com/2011/06/01/1841050/wilson-silence-is-consent.html#ixzz1PTKLmgfR

Chairman ISSA. I thank you.

I will recognize myself for the first round of questionings. But before I do that, I would ask unanimous consent that our letter—or sorry, that the Governor's letter, along with other, a whole lot of other Governors, be placed in the record at this time.

Without objection, so ordered.

[The information referred to follows:]

1747 Pennsylvania Avenue, NW, Suite 250
Washington, DC 20006

June 16, 2011

Mr. Lafe Solomon
Acting General Counsel
National Labor Relations Board
1099 14th Street, NW, Suite 5530
Washington, DC 20570-0001

Dear Mr. Solomon:

During a time when states are recovering from a recession, the best announcement a governor can make is one about new investment and jobs. When a company chooses to come to a state, it does so because the state has a low cost of doing business, a trained workforce, and a favorable regulatory climate. If the company chooses to locate in a right-to-work state, that is an added bonus.

In October 2009, South Carolina welcomed Boeing to North Charleston where the company's second line of 787 Dreamliners would be produced and assembled in a new state-of-the-art facility. By investing billions of dollars in the state and creating thousands of quality jobs, Boeing – with just one announcement – changed the face of South Carolina forever.

However, in April, you and the National Labor Relations Board (NLRB) issued a Complaint and Notice of Hearing for a charge claiming that Boeing's decision to build a new and additional line in South Carolina, instead of Washington, was based on anti-union sentiments. To that claim, the facts are clear. Although South Carolina is a right-to-work state and Washington is not, Boeing continues to invest money and create jobs in both states with seemingly little regard to their differing labor policies. Boeing is not transferring work from a union to a non-union state; Boeing is creating new work in both states.

While Boeing is committed to doing business with union and non-union states, the NLRB has overstepped its mandate to protect the rights of laborers and has instead opted to protect only the interests of organized labor. This undermines the principles of free market capitalism upon which this nation is built. It is clear that if the NLRB can charge Boeing and punish South Carolina, then it can do so to other companies and other states.

When we, as governors, are fighting to improve the economic interests of our states, the federal government should not stand in our way. While governors are trying to break the ties that bind

free enterprises from doing business, the federal government should not tell Boeing where it can build airplanes.

By issuing complaints against businesses for exercising their basic rights, as the NLRB has done, a clear message is sent to all businesses that they are not welcome, that their jobs are not fit for our citizens, and that the benefits of their success should not be shared with our communities.

Accordingly, we ask that you dismiss your case against Boeing: Case 19-CA-32431.

Sincerely,

Governor Nikki Haley
South Carolina

Governor Robert J. Bentley
Alabama

Governor Rick Scott
Florida

Governor Nathan Deal
Georgia

Governor C.L. "Butch" Otter
Idaho

Governor Mitch Daniels
Indiana

Governor Terry E. Branstad
Iowa

Governor Paul R. LePage
Maine

Governor Haley Barbour
Mississippi

Governor Mary Fallin
Oklahoma

Governor Dennis Daugaard
South Dakota

Governor Bill Haslam
Tennessee

Governor Rick Perry
Texas

Governor Gary R. Herbert
Utah

Governor Robert F. McDonnell
Virginia

Governor Matthew H. Mead
Wyoming

Chairman ISSA. Governor, like me, I understand you are not an attorney. But you do understand business very well.

Governor HALEY. Yes.

Chairman ISSA. If the decision by BMW were covered under the same thinking that NLRB is applying to Boeing, isn't it true that basically BMWs would all be produced in Germany?

Governor HALEY. That's exactly right. And BMW officials would tell you that.

Chairman ISSA. And if every company decides, is forced to decide that they have to remain where their entrenched union is, even if it means that they are unable to expand or take advantage of new and emerging markets, both here and around the world, wouldn't that be detrimental to this State? But wouldn't it also be detrimental to companies like General Motors that choose to set up factories in other countries, including China, so that they can expand to take advantage of those markets?

Governor HALEY. Yes. And Mr. Chairman, I actually think it would be more detrimental to places like Washington who don't have the right-to-work laws because they would basically be scared to ever go into those States because they'd think they could never expand outside of those States.

Chairman ISSA. You know, Governor, I will share something with you from my days in electronics. Electronics companies do not wisely set up in Germany because they had those laws. It was impossible to get rid of anything once you went into Germany.

So I even was on the board when we acquired a company that had operations in Germany. We didn't operate it 1 day because if we operated it 1 day, we owned those employees.

And it is really tough to say we are not going to ever touch that facility. Because if we did, we would own it. We couldn't get rid of it. Where we, quite frankly, would have been happy to try to reorganize it, but we didn't want to own it. That is what the people of Washington will face if this continues.

General Wilson, I have a couple of questions for you, and I am going to deviate a little bit. You are also dealing with your right to a secret ballot here, aren't you, with the NLRB?

Mr. ALAN WILSON. That is correct.

Chairman ISSA. And in your knowledge as an attorney and from a Constitution standpoint, has there ever been any question about who conducts elections in the United States? Hasn't that—there has never been such a thing as a Federal election. Every State conducts its own elections pursuant to the Constitution, and isn't every State conducting secret ballots for all of their elected officials, including all of us on the dais?

Mr. ALAN WILSON. Well, absolutely. That is correct.

Chairman ISSA. So the NLRB is trying to, in fact, prevent you from doing something that has been done constitutionally for all elections, all elected officials since our founding?

Mr. ALAN WILSON. It is my personal belief, Mr. Chairman, that an individual's vote, whether it be for a Member of Congress or whether it be to unionize, that your vote be between you and your maker, not be between you and your employer or you and a mob—oh, I said "mob"—union boss. It shouldn't be between anybody—[laughter.]

Governor HALEY. You can say "mob." That's okay.

Mr. ALAN WILSON. My Freudian slip is showing.

Chairman ISSA. General Wilson, that may be popular here, but it might not fly in Seattle. But we understand.

Mr. ALAN WILSON. But we believe that if someone wants to unionize, they have that right, and they should be able afforded that right, and it should be reflected in their vote. Not by intimidation from the employer's perspective or a union's perspective.

Chairman ISSA. Mr. General, Governor, this morning I chose to go to Boeing and go to the new building. And as I am going through the line meeting with employees, no management picking who I walked up to, I ran into a woman named Tina. And she was very quiet, wasn't in management.

And to my amazement, I managed to pick a woman who is fourth-generation Boeing employee, who, in fact, family roots are all in Seattle. And she told me something not because the company told her to, but because she simply believes it. That she is so excited to be working here, a place that she was not transferred. She chose to live here and simply got a job here as a fourth-generation Boeing employee.

She told me, "This place is the future. This is how we are going to continue to be Boeing in America for the rest of my life and the next generation." And I am not going to forget what she told me because she said something great about your State. She said this place is the future of avionics. This is a place where we can continue to export.

And I think you should be very proud of Tina and all the work force I saw there today. And thank you for being a good working State and place where people choose to come from all over the country.

Governor HALEY. Thank you very much.

Chairman ISSA. With that, I recognize the ranking lady for her round.

Mrs. MALONEY. Thank you very much.

And I appreciate very much your testimony. And congratulations on your election.

Governor HALEY. Thank you very much. Thank you.

Mrs. MALONEY. We were even watching it in New York with great interest.

First of all, Governor, your claim to support a worker's right to join or not join a union, you have said. But here is a collection of quotes and statements made by you in recent months about unions, "There is no secret I do not like unions." Second, "Come show your support for a great South Carolina company. Say no to the unions bullying our businesses." "We will continue to do everything we can, stand with the companies who understand what it means to take care of their employees without the interference of a meddlesome, self-serving union." "The more heavy-handed the unions are with us, the more we are going to talk smack back."

These quotes, I would say, is fair to say that they do not portray a neutral employee choice position. Rather, they clearly articulate an anti-union posture, which you have repeatedly communicated to workers in your State.

So my question to you is do you think workers can make a free choice about joining or not joining a union, which they have a federally protected right to do, when the chief executive of their State is so aggressively anti-union and has publicly announced steps undertaken by the State to help companies keep unions out of South Carolina?

Governor HALEY. Thank you, Congresswoman. And welcome to South Carolina.

Mrs. MALONEY. Thank you.

Governor HALEY. Yes, I did make all of those statements. And the reason that I made those statements is when I see the NLRB doing this to Boeing, they give me great reason to say them. And I will tell you that South Carolina is not a State that appreciates being bullied. Our companies don't appreciate being bullied, and the unions have not shown us in any way that they have respect for our employees.

What we have is a great relationship between our employers and our employees. It's a direct relationship. It's one that I will continue to protect under the right-to-work laws that we have.

Any employee has the ability to join a union. What you will find in South Carolina is very few employees want to. And the reason they don't want to is because they love the companies they work for. You can go to our Boeing facility here, and they don't want to be taken by the unions. They want to be made sure that they have the right to choose and what they choose is not to be a part of a union.

Mr. SCOTT. Would the gentlewoman yield for a moment?

Mrs. MALONEY. No, I will not.

Mr. SCOTT. Are you sure?

Mrs. MALONEY. I will at the end of my time.

Mr. SCOTT. Thank you, ma'am.

Mrs. MALONEY. First, well, the case that is being brought is on due process and the right to protest. It is a constitutionally protected right. That is what the case is.

But Attorney General Wilson, you keep referring to the work in South Carolina as "new work." But isn't it true that Boeing has publicly announced that it will close the surge line, one of two assembly lines in Washington State, when its South Carolina plant is fully operational?

Mr. ALAN WILSON. I'm not aware of that comment by Boeing, but I am aware of the line of logic that Representative Scott went in the last panel. How it's hard to transfer something that's not in existence and how it's hard to retaliate when you're adding jobs to a company in State number one, which is Washington State.

So I'm not aware of the comment that you claim Boeing made, but I am aware of the result is that Boeing has netted 2,000 jobs. South Carolina has netted 1,000 jobs.

Mrs. MALONEY. Also, I would like to ask you, as an officer of the court, you must disapprove law breaking as a predicate for economic development. And as an officer of the court, do you believe it is appropriate for a governmental entity to advocate law breaking as an economic development strategy?

Mr. ALAN WILSON. I'm sorry. Say that again.

Mrs. MALONEY. Well, if Boeing has broken the law and illegally retaliated against Washington State workers, wouldn't you, as an officer of the court, have to oppose such actions?

Mr. ALAN WILSON. Well, if Boeing has retaliated by adding 2,000 jobs in South Carolina, 1,000 jobs in Washington State, $6.1 billion investment in this State, then I hope Boeing continues to retaliate against us and every other State in the country because we need more retaliation.

[Applause.]

Mrs. MALONEY. Do you support due process and the right to protest——

Mr. ALAN WILSON. I support——

Mrs. MALONEY [continuing]. Protected under the Constitution of our country?

Mr. ALAN WILSON. I support the due process of the 1,000 jobs that are trying to be taken from North Charleston, SC.

Mrs. MALONEY. The case is about due process and the right to protect the right of workers to protest, which has been a right that has led to many protections for working people in America.

My time has expired.

Chairman ISSA. Mr. Gowdy.

Mr. GOWDY. Thank you, Mr. Chairman. I will yield to my distinguished colleague from the great State of South Carolina, Mr. Tim Scott.

Mr. SCOTT. Thank you, Congressman.

May I ask the Governor just a couple of questions real quick?

Governor, you and I served in the State house together. Is that correct?

Governor HALEY. Yes, we did.

Mr. SCOTT. You were there for 6 or 8 years?

Governor HALEY. Six.

Mr. SCOTT. So when the Boeing plant opened in North Charleston, you were a member of the State house?

Governor HALEY. That's right.

Mr. SCOTT. The employees at the Boeing plant decided to unionize. Did you try to stop that?

Governor HALEY. I did not.

Mr. SCOTT. So you are fully aware of the fact that employees of the Boeing plant decided to start a union. But yet, even though all your comments were just brought to our attention, you did nothing to stop them from having the exercise of their constitutional rights?

Governor HALEY. We have strong people in South Carolina. They're going to do whatever they want to do.

Mr. SCOTT. And you support that?

Governor HALEY. I absolutely support that.

Mr. SCOTT. Are you sure?

Governor HALEY. I—with everything I've got, and I won't make any more comments like that. But yes, I do. [Laughter.]

Mr. SCOTT. Thank you, ma'am.

Mr. GOWDY. Welcome, Governor Haley.

Governor HALEY. Thank you.

Mr. GOWDY. Thank you for your leadership on this issue, and your presence today, I hope, shows the rest of the world how important this issue is to our State. So thank you for being here.

Governor HALEY. Thank you very much.

Mr. GOWDY. To my former colleague Attorney General Wilson, thank you for your service to our State and your service as a very distinguished prosecutor for a number of years.

Mr. ALAN WILSON. Thank you.

Mr. GOWDY. Just for the record, if it matters, surge line doesn't open until 2012. So I think we have yet another pleonasm of something closing before it opens. But there have been several of those here today.

General Wilson, it strikes me that this case is three-dimensional. There is a practical aspect, which the Boeing employee so eloquently set out earlier this morning. There is a patently transparently political aspect to this. And there is a legal aspect to it.

The political aspect, to me, is this administration is no longer content with merely class warfare or generational warfare. We are now going to inject regional warfare into the equation, pitting workers who desperately need work in Washington with those who desperately need it in South Carolina. That is the politics of it.

I want to talk to you for a second about the legal part of it. Have you come across any case law in your exemplary career as an attorney that suggests you cannot state a historical fact without having a complaint lodged against you by the NLRB?

Mr. ALAN WILSON. I'm not aware of any.

Mr. GOWDY. It is a historical fact that there have been work stoppages in Washington State. Correct?

Mr. ALAN WILSON. That is correct.

Mr. GOWDY. And the mere recitation of a historical fact, God help us if that constitutes an actionable incident by the NLRB. Would you agree?

Mr. ALAN WILSON. I do.

Mr. GOWDY. I wonder if it is okay if Boeing executives think it, so long as they just don't say it? [Laughter.]

I mean, can they think, you know, we have had four work stoppages, and we have a customer who is threatening to no longer do business with us. Is it okay to think it? Is that where they messed up, that they actually said something?

Mr. ALAN WILSON. Representative, it is my opinion, based on Mr. Solomon's testimony, that it seems to be a thought police type situation here. Somebody that runs a company, and whether you're the president of Boeing or the chief executive officer of Bubba's Feed and Seed, if you have a business, you should be able to talk to your employees freely and openly about the consequences of actions.

Union employees have every right to strike. That is a protected right that I agree with. But they do not have a right to escape the consequences of their actions.

If a Boeing executive says we cannot afford work stoppages, that should send a reasonable person that has some modicum of common sense, that should send a signal to them that if they can't afford to do something, that means their business model is going to implode and jobs will dissipate. So I don't begrudge any company for taking whatever actions are necessary if it's a legitimate business interest.

The Supreme Court has held that you are allowed to make comments under First Amendment. As a CEO of a company, you're al-

lowed to make First Amendment statements reflecting facts. Work stoppages, $1.8 billion it cost us, we can't continue to operate like this. Supreme Court protects that kind of speech.

What I find interesting is, is that—and even I know we saw a clip earlier. The representative showed us a clip——

Mr. GOWDY. Well, I want to ask you about that because Timmy took all my time, which I hope he will give me some of it back. [Laughter.]

I want to ask you about that because you are a very distinguished prosecutor. You are familiar with the rule of completeness. We could never get away with what the NLRB did in their complaint, which is hijack certain out-of-context quotes, put it in a complaint, and then treat it like it is serious.

You have seen the full context to the quotes, right?

Mr. ALAN WILSON. I have read the full context of the statements. I do not recall every last point in the statements, but I do——

Mr. GOWDY. If we were in a court of law—because I have heard a lot about due process and fundamental fairness. If we were in a court of law, that entire video would have been shown under the rule of completeness because it is patently unfair to select out certain quotes. Is that true?

Mr. ALAN WILSON. I certainly would have objected to it without being——

Mr. GOWDY. Yes, and your objection would have been sustained. With that, my time is up.

Chairman ISSA. Thank you.

The delegate from the District of Columbia, Ms. Norton?

Ms. NORTON. And may I remind the former U.S. attorney that a complaint is a short statement, only the barest statement of what you mean to prove. And a complaint would not contain the whole document. That document, sir, as you well know, would come out at trial. And we have to avoid a trial here.

I welcome both of these officers of the State. While your own testimony might be predictable, protecting your State, your testimony is certainly understandable.

Governor Haley, you certainly have my congratulations. So far as I know, you are the first woman elected in her own right as Governor of a Southern State. That is a breakthrough and one that women of every conceivable political party would want to salute.

Governor HALEY. Thank you.

Ms. NORTON. I will have no questions for you. You are not a lawyer.

Mr. Wilson, you and I belong to something of the same fraternity, so to speak, because we are both members of the bar.

Mr. ALAN WILSON. Yes, ma'am.

Ms. NORTON. I have tried to confine my statements to process because of the capacity of a hearing by a political body to taint the process which is now in operation. You would not want that either because you surely want this to be over, and we don't want to have bases for other matters to be alleged in the nature of a complaint during this complaint.

On outcome, I just want to say for the record, I am not sure whether you are aware. But in cases involving capital investment and the National Labor Relations Act are among the most difficult

cases under the act. Most assuredly, they are not immune from the act, but they are saturated with facts and very difficult.

Moreover, I want to say for the record that while there has been discussion of nothing but remedy here, which State should get the jobs, the remedy section of this action would be heard entirely differently from the violation section of the action. Isn't that true, General Wilson?

That even if there were a violation, there is no certainty that the remedy would be what the prosecutor, in this case the counsel, wishes, which is the jobs themselves in one form or fashion to be in South Carolina—or sorry, Washington State?

Mr. ALAN WILSON. I beg your forgiveness, Representative Norton. I don't believe I understand the question. Are you asking me as it pertains to the remedy, what the remedy would be or that the remedy——

Ms. NORTON. I am saying would not the remedy, the question of remedy be quite different from the question of whether or not there is a violation. So that we don't confuse it. Even if there is a violation of the National Labor Relations Act, it does not follow that the remedy would be to extract the jobs from one location to the other?

Mr. ALAN WILSON. That——

Ms. NORTON. There could be any number of different remedies that the trier of fact could insist upon. Isn't that not the case?

Mr. ALAN WILSON. Representative, my fear is that there could be other remedies. But the effect of the complaint, what the complaint asked for is, in essence, that the Boeing plant be closed and be moved back to Washington State.

My concern is the chilling effect that this action is having not just across South Carolina and Washington State, but throughout the United States and throughout the world.

Ms. NORTON. Mr. Wilson, every time that a prosecutor—I am sorry, my time is limited—brings a case, he will chill something. And often the prosecutor loses. This is America after all. What the prosecutor wants and what the law finds are two different things very often. That is the difference between us and the rest of these people who don't believe in due process.

You say the act—in your prepared statement, the act imposes few constraints upon the free flow of capital to a right-to-work State. I couldn't agree with you more.

Legal precedents clearly demonstrate that Boeing's decision to expand to South Carolina is lawful. Would you not agree that though you argue that as a prosecutor—that is a typical prosecutorial statement—would you not agree that that is a question for the trier of fact?

Mr. ALAN WILSON. Representative Norton, I have met with numerous business officials throughout the State and country, and the punitive measures right now are being realized——

Ms. NORTON. I am asking you, sir, is that not a question—I understand your view. I am not taking exception to your view. My question is, is that statement that it clearly—that Boeing's decision is lawful, is that not a question for the trier of fact?

Mr. ALAN WILSON. I would dispute to the degree that when it's prosecutorial misconduct, it should be challenged at the forefront.

Ms. NORTON. Are you alleging that there has been prosecutorial——

Mr. ALAN WILSON. Absolutely.

Ms. NORTON. Would you name what the misconduct has been?

Mr. ALAN WILSON. Had you not been here for the last 20, 30 minutes? So——

Ms. NORTON. Have you not been here for the last 4 hours?

Mr. GOWDY [presiding]. The gentlelady's time——

Ms. NORTON. What is the prosecutorial misconduct?

Mr. GOWDY. The gentlelady's time has expired.

Ms. NORTON. You allege misconduct by the prosecutor. Name the misconduct. Name the misconduct.

Mr. GOWDY. The gentlelady will suspend. The gentlelady's time has expired. At this point——

Ms. NORTON. That is a terrible allegation to make unsupported. And for you to let him get off without telling us what the misconduct is, Mr. Chairman——

Mr. GOWDY. The gentlelady from the District of Columbia is happy to seek someone to yield to her if she would like to continue her time, but she is out of time.

The chair would now recognize the gentleman from the great State of Texas, Mr. Farenthold.

Ms. NORTON. You have allowed everybody else to respond to the question, and you are not allowing him to respond to the question. I asked the question in time, and the——

Mr. GOWDY. I would tell—I would advise—the gentlelady will suspend.

Ms. NORTON [continuing]. Chairman has allowed, once the question was asked in time, the question, has allowed the response to be made.

Mr. GOWDY. The gentlelady will suspend. The gentlelady will suspend.

If you would like to seek time from another Member, you are welcome to do so.

Ms. NORTON. I seek time from you, Mr. Chairman, for fairness.

Mr. GOWDY. It is not my time.

Ms. NORTON. To get a response to my question.

Mr. GOWDY. I don't need any lectures. I don't need any lectures on fairness, with all due respect.

Ms. NORTON. You are getting one right here, Mr. Chairman.

Mr. GOWDY. Well, I don't need one from anybody to my right.

Ms. NORTON. You need them from a lot of people.

Mr. GOWDY. Mr. Farenthold, the gentleman from Texas, you are recognized.

Mr. FARENTHOLD. Thank you very much.

I am going to take this back up to the cruising altitude of 30,000 feet. [Laughter.]

And move up to the big picture questions.

Governor Haley, can you talk for a second about some of the things that you have done here in South Carolina to create jobs and some of the laws and policies you have in effect to do that?

Governor HALEY. Yes. Thank you, Congressman, and welcome to South Carolina.

Mr. FARENTHOLD. Thank you.

Governor HALEY. We appreciate you being here.

You know, South Carolina, since I've taken office in January, we have recruited, created, expanded 7,000 additional jobs to South Carolina just since January. And the reason is the cost of doing business is low. We just passed stronger tort reform. We've got a director of labor that has just reduced fees and regulations for our businesses.

We understand what it means to have a pro-business State. So it's workers comp reform. It's tort reform. It's making sure our taxes are low. It's making sure that we stay competitive. It's making sure that we provide companies the trained work force that they need.

That's why they come to South Carolina. And then they see our beaches and our mountains, and that's just an added given. [Laughter.]

Mr. FARENTHOLD. Now I assume that, as a politician and a Governor, you kind of follow what is going on in Washington, DC. You said you have reasonable taxes. I think we have a call for higher taxes from Washington, DC.

I think you said you were trying to reduce regulations. I think we can see that all Government agencies in Washington right now are trying to increase. You have tort reform that you passed. We are not talking about that in D.C. And you are talking about a spirit of cooperation with businesses. And if you look at Washington, I think you will see the exact opposite, this case being one of adversarial.

So you all are creating jobs at a very high rate, as we are in the State of Texas. We have basically got the same climate that you have. And in fact, the past few years, 37 percent of the jobs created in this country were created in Texas with just those things—low taxes, low regulation, tort reform, and cooperation.

Do you think there might be a concerted effort on the part of the Government to see that States like South Carolina and Texas have a hard time creating jobs because it disproves some of the things that the current administration is trying to implement in Washington, DC?

Governor HALEY. Well, first of all, I will tell you that Texas is one that I enjoy competing with, and I continue to tell Governor Perry I'm taking all his jobs away from him. But having said that, I will tell you that with all due respect, Washington is dysfunctional.

And everything that I have tried to do as a Governor, whether it is to fight healthcare, D.C. has continued and the President has continued to fight and push mandates on us. Whether it is to create jobs, he is continuing to allow cases like the NLRB to create problems with our companies. Whether it is with illegal immigration, he has gotten in the way of allowing us to enforce that.

And so, I will tell you that with a Governor, whether it's Texas or South Carolina, we have a job to do, and that's to create jobs. And we have gotten no help from Washington.

Mr. FARENTHOLD. Now, and I appreciate that. I am glad we are on the same path to realizing that job creation is really the most important thing in this country right now. Every person that we get back to work saves us money, brings money in as new tax-

payers, and grows the economy. And I am hoping we can get the Federal Government to act more like South Carolina and Texas than we are right now.

That being said, you all can have the 787, we are looking at the 797s. Anybody here from Boeing, we would love to have you in Texas. [Laughter.]

With that, I will yield to——

Governor HALEY. Stay away from that. We're not going to let that happen.

Mr. FARENTHOLD. With that, I will yield the rest of my time to the acting chair.

Mr. GOWDY. I thank the gentleman from Texas.

General Wilson, you received a question trying to link up the allegations of the complaint with the remedy sought. Would you agree with me that the remedy sought is illustrative of the intent of the complainer? You and I didn't seek death penalty for auto theft, did we?

Mr. ALAN WILSON. That is correct.

Mr. GOWDY. We don't seek death penalty for shoplifting. The remedy sought has to be commiserate with the alleged offense. And the fact remains that the NLRB sought essentially a death penalty for this State when they fashioned their remedy. Do you agree with that?

Mr. ALAN WILSON. Absolutely.

Mr. GOWDY. All right. I would at this point recognize the gentleman from Ohio, Mr. Kucinich.

Mr. KUCINICH. Thank you very much, Mr. Chairman.

Governor, General, there are aspects of this discussion that can get very heated. I understand there is 1,000 jobs at stake here, and I respect that people in South Carolina are fighting for their constituents because that is what you are supposed to do.

I am just concerned, though, in the heat of the moment that statements don't go out that later on could, if not corrected or amended could be the basis for distractions. And so, I just want to ask to respectfully ask General Wilson the statement about prosecutorial misconduct, is that a global statement? Or I just want to make sure that we don't get ourselves in a situation where you are vulnerable to sanctions because of a charge that may not be substantiated.

Mr. ALAN WILSON. My—my comments were global in nature and not meant to be specifically targeted toward anyone's integrity or intent. But——

Mr. KUCINICH. Okay. I just—thank you.

Mr. ALAN WILSON. I can expound.

Mr. KUCINICH. No, that is what I was hoping to hear.

Mr. ALAN WILSON. Okay.

Mr. KUCINICH. I want to say that there were a couple of questions that were asked by my colleagues here that I had sought answers to, and I am just going to use this time to go over the territory. There has been a suggestion that Boeing was only transferring new work, not work that already exists in Washington.

And I had inquired of the IAM, and what they have said is that Boeing is running two assembly lines in Washington, a line that can produce seven 787s per month and a surge line that is in-

tended to produce three 787s per month, although it has capacity for more. And Boeing has announced it will close the surge line if and when it starts building the three 787s per month in South Carolina. Clearly, a transfer of existing work.

And the next question I had related to the statement about Boeing having added jobs in Puget Sound so that the workers there haven't been harmed. What I have learned is that is not true. That as Boeing has admitted to the press, its strategy to outsource all 787 parts and subassemblies, only doing final assembly in Washington, has been a supply chain disaster.

The company has had to hire a large temporary work force to rework a large number of partially assembled 787s, as the company still tries to complete them. Once those problems are solved, the extra jobs in Puget Sound will vanish, and all of the jobs in the surge line will also go away if and when Boeing opens up that line in South Carolina and that Boeing's retaliation in Washington will have caused a major loss of work and jobs.

So I just wanted to get that on the record. I want to ask the Governor, Governor, do you believe that workers have a right to organize?

Governor HALEY. Yes.

Mr. KUCINICH. Do they have a right to collective bargaining?

Governor HALEY. Yes.

Mr. KUCINICH. And do they have a right to strike?

Governor HALEY. Yes.

Mr. KUCINICH. And you are familiar with the National Labor Relations Act?

Governor HALEY. Yes.

Mr. KUCINICH. And you are familiar that employers are forbidden to engage in coercion, intimidation, retaliation?

Governor HALEY. Yes.

Mr. KUCINICH. And if you had learned that an employer had engaged in retaliation for a statutorily permitted action on the part of workers, as Governor, you would want to see the law enforced, would you not?

Governor HALEY. Well, I think it's—you know, you have to see what retaliation is. What I will tell you is that what I have witnessed is absolutely un-American. And when we——

Mr. KUCINICH. What do you mean, un-American?

Governor HALEY. When you have a National Labor Relations Board that is getting—that is actually going against a great American company like Boeing and telling them that they cannot create jobs, the precedent that that sends to any company looking to create jobs in this country, the precedent that that sends to any company looking to create jobs in any other State is terrible.

And the fact that we have allowed this——

Mr. KUCINICH. Governor, I have 30 seconds left.

Governor HALEY. Yes?

Mr. KUCINICH. I just want to say this. That the issue here is whether or not Boeing retaliated against workers for exercising their protected rights against the law. We could agree that Boeing is a good company. But the question is in this case, it is a narrow question. Did they violate the National Labor Relations Act by

threatening to leave one area in exchange, you know—and if they did not get their way?

Now this becomes relevant because, let's face it, somewhere down the line, you, as Governor, could be faced with a case that could be similar if someone wants to threaten to move jobs out of South Carolina. Because you have jobs here, big industries, that people later on just pulled out. And you know, corporations have a lot of power in that regard.

I want to—thanks for your indulgence. Thank you, Your Honor and General Wilson. Thank you.

Governor HALEY. Thank you.

Mr. Chairman, could I just comment on that quickly?

Mr. KUCINICH. My time has expired.

Mr. GOWDY. The gentleman's time has expired. Perhaps Representative Scott would be gracious enough to allow you to expound on that when his time.

But at this point, I would recognize the gentleman from Iowa, Mr. Braley.

Mr. BRALEY. Thank you, Mr. Chairman.

And I was struck by the irony of your comment accusing the Obama administration and President Obama of regional warfare. We are, after all, in Charleston, SC, and Charleston knows a thing or two about regional warfare. There was a little incident here 150 years ago that gave new meaning to the concept of regional warfare.

But I think the important thing that I need to share with you, Mr. Chairman, and with the Governor is that on behalf of all Iowans, I take great pride in the fact that Big Red was returned to the State of South Carolina and the Citadel after careful and meticulous preservation by the Iowa Historical Society. So that is one positive thing that can bring us all together. [Laughter.]

Governor, let me start with you. Representative Scott made a comment in his opening statement accusing the NLRB of using your tax dollars in an unprecedented way. My question for you is did the State of South Carolina use State taxpayers' dollars in an unprecedented way to lure Boeing's production line here?

Governor HALEY. No.

Mr. BRALEY. So the question I am asking you is Boeing the biggest welfare queen of the State of North Carolina, or has someone received more than $900 million in incentives from the State to locate here?

Governor HALEY. I mean, you know, as we do with all companies when we're trying to get them to come to South Carolina, we compete with all of your States to try and get them to come. And so, sometimes we do use economic development incentives to do that or job incentives to do that.

Mr. BRALEY. Right. And my question is, is this $900 million package the biggest incentive given to anybody to locate here in the State of South Carolina that you know of?

Governor HALEY. Yes.

Mr. BRALEY. One of the questions that I have for you, Mr. Attorney General, is based upon a statement that was in your prepared remarks, where you indicated it was your duty as South Carolina's

chief legal officer to defend your constitution, your State, and your citizens. Do you remember that?

Mr. ALAN WILSON. I do.

Mr. BRALEY. Did you also swear an oath to defend the Constitution and the laws of the United States when you were sworn in as attorney general?

Mr. ALAN WILSON. I did.

Mr. BRALEY. Okay. So even though your job is as attorney general of the State of California—South Carolina, forgive me.

Mr. ALAN WILSON. That's okay. Good State.

Mr. BRALEY. You also have a corresponding duty to recognize that South Carolina—at least since it came back into the Union—has operated within a Federal system where there are corresponding duties and responsibilities of elected officials here in the State?

Mr. ALAN WILSON. That is correct.

Mr. BRALEY. And one of the things that you also did was you cited Alexander Hamilton in your statement that you shared with us today.

Mr. ALAN WILSON. That is correct.

Mr. BRALEY. I found that ironic also because Alexander Hamilton founded the Federalist Party and founded the National Bank and also the Federal Reserve, which a lot of people in South Carolina aren't happy about right now.

So I guess my question for you is do you understand that in a Federal system that there are Federal agencies who have a responsibility to operate within that constitutional framework and do their duty free of interference from outside parties in order for that to be fundamentally fair to all of the parties involved?

Mr. ALAN WILSON. May I state my opinion?

Mr. BRALEY. Yes.

Mr. ALAN WILSON. My opinion is, is that the law was being misapplied by the National Labor Relations Board. It is my duty to protect and defend the Constitution when the Constitution itself is not being attacked, and I believe that is what I'm doing, Representative.

Mr. BRALEY. Well, you made a statement in an opinion piece you published in The State on Wednesday, June 1, 2011, where you accused the President of being silent. And you wrote, "The President's silence is consent, akin to a parent in a grocery store refusing to control an unruly child. As a result, the labor board has been given the green light to wage war on commerce and industry."

Do you remember writing that?

Mr. ALAN WILSON. Yes, I do.

Mr. BRALEY. Does Governor Haley have the legal authority to control your actions and tell you what to do, as head of the Justice Department of the State of South Carolina?

Mr. ALAN WILSON. She does not.

Mr. BRALEY. So would you expect President Obama to have the ability to control his administrative agency officials in carrying out their responsibility under the Constitution?

Mr. ALAN WILSON. Representative, two of the board members are recess-appointed members who circumvented Senate confirmation, including the acting general counsel. Second——

Mr. BRALEY. Well, wait a second. That happens all the time.

Mr. ALAN WILSON. Am I allowed to answer?

Mr. BRALEY. A recess appointment is not something that is bizarre or unusual. It is a practical reality of the political consequence of confirmation in the Senate, isn't it?

Mr. ALAN WILSON. Representative, the President, who I want to see be successful, because when he fails, we all fail. But his actions are leading us down the wrong path.

Mr. BRALEY. That is not my question.

Mr. ALAN WILSON. Let me explain.

Mr. BRALEY. My question for you is, isn't that a practical consequence of the difficult confirmation process that we have seen get increasingly partisan for any Senate confirmation? The fact that there are recess appointments does not in any way diminish the fact that they have a sworn obligation to uphold the law of the United States.

Mr. ALAN WILSON. Representative, I would like to see the President speak out. He doesn't have to get involved in the independent agencies' actions. But when his own Chief of Staff voted on the board of Boeing unanimously to locate Boeing to South Carolina, you all are all saying that the Chief of Staff of the President of the United States violated Federal law.

I would like the President of the United States either to defend his Chief of Staff's actions or at least say that the actions of this board could have dire economic consequences for all States.

Mr. BRALEY. Which Chief of Staff are you talking about?

Mr. ALAN WILSON. Mr. Daley.

Mr. BRALEY. Bill Daley?

Mr. ALAN WILSON. Yes, sir.

Mr. BRALEY. Okay. So when you talk about his responsibility, are you talking about his role as Chief of Staff to have an obligation to direct the President to take action?

Mr. ALAN WILSON. These were Mr. Daley's actions prior to Chief of Staff. But if my chief of staff violated Federal law, I would certainly speak out against it.

The point is, Representative, that I would like to see the President—the President is out there, talking about building manufacturing jobs through private and public cooperation and partnerships. But at the same time, he has an agency out there that is doing everything contrary to that effort.

And I would like to see the President get out there and talk about when you do things that cause CEOs of businesses to not want to come to States, this hurts union States more than right-to-work States. This hurts us all.

I would like to see the President speak to that. Whether or not he gets involved with Mr. Solomon's case is irrelevant, and I respect the independence of that agency, and I respect the President for staying out of that. But speaking out on the effects that this could have on our global economy is paramount.

Mr. BRALEY. Well, I am glad we agree that it is important to maintain the integrity of the adjudicative process, and I yield back my time.

Mr. GOWDY. Thank you. The gentleman's time has expired.

In light of our colleague's comments about the rich and provocative at times history of our great State, it is my pleasure to recognize my colleague from Charleston, Mr. Tim Scott. [Laughter.]

Mr. SCOTT. Thank you.

As our chairman has referred to me as "Congressman Timmy"—[laughter]—I do not want this to be taken away from my time, but my good friend on the end there started a process of asking questions that really compared apples to oranges. So let me make sure that I have this straight.

Mr. Wilson, did the Governor appoint you?

Mr. ALAN WILSON. No.

Mr. SCOTT. Did the President appoint Mr. Solomon?

Mr. ALAN WILSON. Yes.

Mr. SCOTT. Governor, does the attorney general of South Carolina serve at your pleasure or the people's pleasure?

Governor HALEY. No, at the people's pleasure.

Mr. SCOTT. Are you sure?

Governor HALEY. I am positive.

Mr. SCOTT. Are you all sure?

[Audience response.]

Mr. SCOTT. We are sure. Okay. Does Mr. Solomon serve at the pleasure of the President? Would you concur?

Mr. ALAN WILSON. Yes.

Mr. SCOTT. Okay. I wanted to make sure that we had those facts straight. When we are talking about the return on investment of the $900 million that South Carolina invested—not gave or spent, but invested—in Boeing, is it unprecedented for us to reserve a return on investment of $14 for every $1 invested, according to the Post and Courier's analysis of the economic development package.

So, question. If you had an opportunity to invest a dollar and get $14 back, would you do it every day, every other day, or once a week? [Laughter.]

Because I sure want to understand this.

Governor HALEY. We would do it all the time.

Mr. SCOTT. Okay. So if we can get another one of those tomorrow, on Saturday——

Governor HALEY. I'm on it.

Mr. SCOTT [continuing]. You'll come into work, and you'll sign on?

Okay. Let us not get confused by the mumble-jumble of politicians. When you think about this as a simple return on investment, the Boeing Corp.'s decision to invest their resources in our soil is, in fact, a solid return on investment for the people of South Carolina.

Governor HALEY. Yes. And Congressman, I will tell you this. It doesn't take an attorney general. It doesn't take a rocket scientist to look at this and see that this is flat-out wrong. This isn't wrong for South Carolina. This is wrong for every State in the country.

And I will tell you that the actions that are taken in reference to this National Labor Relations Board move will impact our country forever. This is serious. I don't want any other Governor to have to go through what we're having to go through.

And I will tell you that when you were talking about retaliation?

Mr. SCOTT. Yes.

Governor HALEY. The retaliation is coming from the President—retaliation is coming from the NLRB. It is not coming from Boeing.

Mr. SCOTT. I am glad you brought up the case of this global economy. When you think about our competition in this State, are we simply competing against Georgia or North Carolina or Washington State? When your top prospects call into your office looking for an opportunity to do business anywhere, do they simply say it is either you guys or North Dakota or Texas?

Governor HALEY. I'm right now talking with international companies. We're talking to companies from India. We're talking to companies from Germany. We're talking to several companies outside of the United States.

This doesn't just keep them from coming to South Carolina. This keeps them from even looking at any State in our country when they see that something like this can happen.

Mr. SCOTT. With a 9.1 percent national unemployment, with a double-digit unemployment in South Carolina, does this feel like a joke to you?

Governor HALEY. This is not funny.

Mr. SCOTT. Thank you.

Mr. Wilson, when you take into consideration the comments made about the constitutional responsibilities of your office, do you take into consideration the fact that the 9th and the 10th amendments of our Constitution allows for States to have autonomy over what creates a workable atmosphere for employment opportunities?

Mr. ALAN WILSON. I do.

Mr. SCOTT. So do you believe that the right-to-work laws that are in our State help us or hurt us?

Mr. ALAN WILSON. I believe they help us.

Mr. SCOTT. Thank you, sir.

No further questions.

Mr. GOWDY. I want to thank, Madam Governor, thank you again for your presence, your testimony, and your leadership on this issue.

Mr. Attorney General, wonderful to see you. I am not sure why your father didn't want to be present for it, but we will investigate that and get back to you on it. [Laughter.]

On behalf of all of us on both sides, thank you for being here.

And to my colleagues who are not from South Carolina, thank you for visiting our State. And if there is anything Tim or I or Joe or anyone else could do to make the remainder of your stay more hospitable, please let us know.

With that, we are recessed.

[Whereupon, at 3:43 p.m., the committee was adjourned.]

[Additional information submitted for the hearing record follows:]

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June 27, 2011

2011 JUN -1 A 10:41

Mr. Lafe E. Solomon
Acting General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570-0001

Dear Mr. Solomon:

Thank you for appearing before the Committee on Oversight and Government Reform on June 17, 2011, at the hearing entitled, "Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise." We appreciate the time and effort you gave as a witness before the Committee.

Pursuant to the Chairman's directions, the hearing record remains open to permit Members to submit additional questions to the witnesses. Attached are questions directed to you from Representative Dennis Ross, a member of the Committee. In preparing your answers to these questions, please address your response to the Member who has submitted the question and include the text of the Member's question along with your response.

Please provide your response to these questions by July 11, 2011. Your response should be addressed to the Committee office at 2157 Rayburn House Office Building, Washington, DC 20515. Please also send an electronic version of your response by e-mail to Michael Bebeau, Assistant Clerk, at Michael.Bebeau@mail.house.gov in a single Word formatted document.

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact Kristina Moore or Kristin Nelson at (202) 225-5074.

Sincerely,

Darrell Issa
Chairman

Attachment

Questions for Mr. Lafe E. Solomon
Acting General Counsel
National Labor Relations Board

Representative Dennis Ross
Committee on Oversight and Government Reform

Hearing on "Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise."

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1) 29 CFR 102.29 allows any person who wishes to intervene in a proceeding before the NLRB to file a motion to intervene. Section 10388.1 of the NLRB Casehandling Manual, Part One, Unfair Labor Practice Proceedings, states that the "Counsel for the General Counsel should not oppose intervention by parties or interested persons with direct interest in the outcome of the proceeding." As you know, the parties that moved to intervene in the case claim that if the remedy requested in the Compliant is granted they will be "discharge[d] from employment;" therefore, they have a "direct" interest in the outcome of the case. Please provide an explanation of why you believe that the risk of job loss does not amount to a "direct interest in the outcome" of the NLRB's proceeding against Boeing. Since you do not oppose these same parties filing post-hearing briefs, why should they be forced to wait until the hearing has concluded to express their concerns?

United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, DC 20570
www.nlrb.gov

July 11, 2011

The Honorable Darrell Issa, Chairman
Committee on Oversight and Government Reform
House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Issa:

I write in response to your June 27, 2011 letter regarding an additional question for the June 17, 2011 hearing record. Specifically, the question from Congressman Ross is:

> 29 CFR 102.29 allows any person who wishes to intervene in a proceeding before the NLRB to file a motion to intervene. Section 10388.1 of the NLRB Casehandling Manual, Part One, Unfair Labor Practice Proceedings, states that the "Counsel for the General Counsel should not oppose intervention by parties or interested persons with direct interest in the outcome of the proceeding." As you know, the parties that moved to intervene in this case claim that if the remedy requested in the Complaint is granted they will be "discharge[d] from employment;" therefore, they have a "direct" interest in the outcome of the case. Please provide an explanation of why you believe the risk of job loss does not amount to a "direct interest in the outcome" of the NLRB's proceeding against Boeing. Since you do not oppose these same parties filing post-hearing briefs, why should they be forced to wait until the hearing has concluded to express their concerns?

In response, I affirm my belief, with which the administrative law judge and the Board agreed, that the putative employee intervenors have no legally cognizable interest in the instant case that would warrant full intervenor status. This in no way prevents the parties from calling any of these employees as witnesses to provide relevant testimony during the Boeing proceeding before the administrative law judge, nor does it preclude these employees from filing a post-hearing brief.

The employees stated that they sought to intervene to oppose the complaint and the requested remedy. This is the exact same ultimate objective as Boeing, their employer. As a matter of law, it must be presumed that their interests will be adequately represented, and, in fact, there is a presumption of adequacy of representation when the intervenor has the same ultimate objective as an existing

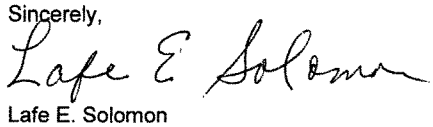
party. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997). Thus, their presence as intervenors at the hearing is not necessary in order to enable the Board to determine whether Boeing has violated the statute or to make an appropriate order against Boeing.

As to the remedy, to the extent that these employees assert that their interest in the proceeding is based on their belief that the remedy sought will cause their discharges, such speculation does not justify their intervention as nothing in the complaint requires Boeing to shut down any of its operations in South Carolina and they cannot and do not know what business decisions Boeing will make if the remedy sought is granted. Moreover, it is well settled that employees do not have any protectable interest in positions that they may have obtained due to unlawful employment decisions. *Donnelly v. Glickman*, 159 F3d 405, 411 (9th Cir. 1998), citing *Dilks v. Aloha Airlines, Inc.*, 642 F.2d 1155, 1157 (9th Cir. 1981). Additionally, I note that two of the three employees are not even assigned to work on the second 787 production line at issue in this case and they have not advanced any factual basis for believing that the remedy will affect their positions in the facilities where they do work. Lastly, the remedy sought does not interfere with their Section 7 right to elect not to be represented by a union.

In summary, full intervenor status, which would require participation of these employees as additional parties in this complex case, is not necessary, creates procedural burdens, and adds to the parties' litigation costs.

If you have further questions, please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700.

Sincerely,



Lafe E. Solomon
Acting General Counsel

cc: The Honorable Dennis Ross, Chairman
Subcommittee on Federal Workforce, U.S. Postal
Service and Labor Policy

MEMORANDUM May 27, 2011

To: House Committee on Oversight and Government Reform
Attention: Daniel Epstein

From: Todd B. Tatelman
Legislative Attorney
American Law Division

Subject: **Application of *Pillsbury* Doctrine to Congressional Oversight Inquiries**

This memorandum responds to your request for a legal analysis of the application of the *Pillsbury* Doctrine to congressional oversight. Specifically, the Committee has asked whether the *Pillsbury* Doctrine can be legitimately relied upon by federal agencies for the purpose of refusing to provide requested documents and information. The committee has also inquired as to the relationship, if any, between the *Pillsbury* Doctrine and the "deliberative process privilege," which agencies often rely upon to protect information directly related to their decision-making processes.

Based on our review of Congress's constitutionally-based oversight authority, the decision in *Pillsbury Co. v. Federal Trade Commission*,[1] subsequent court decisions, and the rationale for the "deliberative process privilege," it appears that the *Pillsbury* Doctrine, while potentially a relevant consideration for Congress when engaging in oversight of pending agency decisions, does not create a privilege or legal basis for the withholding of congressionally-requested information. Reading the *Pillsbury* Doctrine in a manner that would elevate it to a privilege or basis to withhold information from Congress is arguably inconsistent with the balance that the federal courts have attempted to fashion between Congress's oversight and investigative functions on one hand, and the procedural due process rights of participants in proceedings before administrative agencies on the other.

Congress's Oversight Authority

Generally, Congress's authority and power to obtain information, including but not limited to confidential information, is extremely broad. While there is no express provision of the Constitution or specific statute authorizing the conduct of congressional oversight or investigations, the Supreme Court has firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress.[2] In *Eastland v. United States Serviceman's Fund*, for instance,

[1] 354 F.2d 952 (5th Cir. 1966).

[2] *See, e.g., Nixon v. Administrator of General Services*, 433 U.S. 435 (1977); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Barnblatt v. United States*, 360 U.S. 109 (1959); *Watkins v. United States*, 354 U.S. 178 (1957); *McGrain v. Daugherty*, 273 U.S. 135 (1927).

the Court stated that the "scope of its power of inquiry...is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] Also, in *Watkins v. United States,* the Court emphasized that the "power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[4] The Court further stressed that Congress's power to investigate is at its peak when focusing on alleged waste, fraud, abuse, or maladministration within a government department. Specifically, the Court explained that the investigative power "comprehends probes into departments of the federal government to expose corruption, inefficiency, or waste."[5] The Court went on to note that the first Congresses held "inquiries dealing with suspected corruption or mismanagement of government officials."[6] Given these factors, the Court recognized "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."[7]

As a corollary to this accepted oversight authority, the Supreme Court has likewise determined that the "[i]ssuance of subpoenas...has long been held to be a legitimate use by Congress of its power to investigate."[8] In particular, the Court has repeatedly cited the principle that:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry – with enforcing process – was regarded and employed as a necessary and appropriate attribute of the power to legislate-- indeed, was treated as inhering in it.[9]

While the congressional power of inquiry is broad, it is not unlimited. The Supreme Court has admonished that the power to investigate may be exercised only "in aid of the legislative function"[10] and cannot be used to expose for the sake of exposure alone. The *Watkins* Court underlined these limitations stating that:

> There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress . . . nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.[11]

Moreover, an investigating committee has only the power to inquire into matters within the scope of the authority delegated to it by its parent body.[12] Once having established its jurisdiction and authority and the

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[3] 421 U.S. at 504, n. 15 (quoting *Barenblatt, supra*, 360 U.S. at 111).

[4] 354 U.S. at 187.

[5] *Id.*

[6] *Id.* at 182.

[7] *Id.* at 200, n.33.

[8] *Eastland v. United States Servicemen's Fund*, 421 U.S. at 504.

[9] *McGrain*, 273 U.S. at 175; *see also Buckley v. Valeo*, 424 U.S. 1, 138 (1976), *Eastland*, 421 U.S. at 504-505.

[10] *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

[11] *Watkins v. United States*, 354 U.S. at 187.

[12] *United States v. Rumely*, 345 U.S. 41, 42, 44 (1953); *see also Watkins v. United States*, 354 U.S. at 198.

pertinence of the matter under inquiry to its area of authority, however, a committee's investigative purview is substantial and wide-ranging.

Pillsbury Co. v. Federal Trade Commission

The *Pillsbury* Doctrine stems from the 1966 decision of the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) in *Pillsbury Company v. Federal Trade Commission*,[13] which invalidated a Federal Trade Commission (FTC or Commission) divestiture order on the grounds that the FTC's decisional process had been tainted by impermissible congressional influence.[14] At issue in *Pillsbury* was the impact of intense interrogations of the FTC Chairman and several members of his staff during the course of several Senate subcommittee hearings. The hearings centered on the FTCs interpretation of section 7 of the Clayton Act, which was a key issue in the antitrust adjudication that was pending before the Commission. The Senators expressed opinions on the issue and criticized a previous FTC interlocutory order that had decided in Pillsbury's favor.[15] According to the court, the clear message of the Senate subcommittee criticism was that the FTC should have ruled against Pillsbury.[16] Subsequently, in its final decision the FTC ruled as the subcommittee had suggested. On appeal by Pillsbury to the Fifth Circuit, the court found the Senate inquiry to be an "improper intrusion into the adjudicatory process of the Commission."[17] The court emphasized that because the FTC was exercising an adjudicatory or judicial function, the private litigants had a "right to a fair trial" and the "appearance of impartiality" as part of the general guarantees of procedural due process.[18] According to the court:

> when [a congressional] investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency's legislative function, but rather, in its judicial function. At this latter point, we become concerned with the right of private litigants to a fair trial and, equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences ... [t]o subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the "wrong" decision, as the Senate subcommittee did in this case, sacrifices the appearance of impartiality—the *sine qua non* of American judicial justice—in favor of some short-run notions regarding the Congressional intent underlying an amendment to a statute, unfettered administration of which was committed by Congress to the Federal Trade Commission.[19]

Despite its holding invalidating the FTC's decision, the court recognized that there is a proper and legitimate role for Congress and its investigative powers. The court explained that it believed a balance was required between the competing interests and that the courts, by preserving the integrity of the

[13] 354 F.2d 952 (5th Cir. 1966).

[14] *Id.* at 963.

[15] Early in the proceeding, the FTC had issued an interlocutory order announcing it would use the rule of reason rather than a per se rule to evaluate acquisitions under the Clayton Act.

[16] *See* 354 F.2d at 955-62 (containing excerpts from the hearing transcripts indicating that the committee chairman's questioning was hostile and pointed and expressed the strongly held view that the FTC should use the "per se rule," as well as the fact that both the Senators and the FTC Chairman frequently referred to the facts of the Pillsbury case to illustrate their views).

[17] *Id.* at 963.

[18] *Id.* at 964.

[19] *Id.* (internal citations omitted).

judicial function, "can preserve the rights of the litigants in a case such as this without having any adverse effect upon the legitimate exercise of the investigative power of Congress."[20]

The *Pillsbury* Doctrine

In addition to situations involving administrative agency adjudications, the federal courts have extended the *Pillsbury* Doctrine to other areas of administrative agency activity. For example, in *D.C. Federation of Civic Associations* v. *Volpe*,[21] the D.C. Circuit invalidated a non-adjudicatory decision by the Secretary of Transportation on the grounds that the decision maker was improperly influenced by legislative actions. The administrative action at issue in *Volpe* was the Secretary's decision to authorize funding for the Three Sisters Bridge across the Potomac River. According to the court, while considering whether to authorize funding for the bridge, the Secretary appeared at a hearing before the House appropriations subcommittee with jurisdiction over the funding.[22] At that hearing, the subcommittee chairman, Representative Natcher, made it clear that he would withhold congressional funding for a much needed D.C. subway system until the funding for the bridge was authorized.[23] Writing for the court, Judge Bazelon's opinion makes it clear that the court's standard – that extraneous congressional influences shown to have had an actual impact on an agency decision making will taint such administrative action[24] – is crafted for the special administrative circumstances of the situation before it: where the decisional process was neither judicial or legislative in nature.

Another expansion of the *Pillsbury* Doctrine occurred in *Texas Medical Association* v. *Mathews*,[25] which involved an agency rulemaking proceeding. In *Mathews*, the U.S. District Court for the Western District of Texas considered the question of whether congressional pressure, in the form of a meeting between agency officials, Senator Wallace Bennett, sponsor of the relevant underlying legislation, and a senior staff member of the Senate Finance Committee should invalidate a decision of the Department of Health, Education and Welfare (HEW) dividing Texas into nine Professional Standards Review Organizations (PSRO). The agency, after consulting with the plaintiff and several other interested groups, initially announced it would form one statewide PSRO. However, after the meeting with congressional officials, the agency abruptly changed its mind and called for the division of Texas into nine PSRO's. Applying the standard articulated in *Volpe* that "agency action is invalid if based, even in part, on pressures emanating from Congressional sources,"[26] the court concluded that:

> the fact that an agency decision is a 'little pregnant' with pressures emanating from Congressional sources is enough to require invalidation of the agency action. Especially should this be the law where, as here, the invasive Congressional source has financial leverage on the involved agency.[27]

Subsequent cases involving agency rulemaking proceedings, however, have resulted in more deference being given by the courts to the political process and fewer findings of undue legislative influence. Of

[20] *Id.* (citing *United States v. Morgan*, 313 U.S. 409 (1941)).

[21] 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972).

[22] *Id.* at 1245.

[23] *Id.* (citing *D.C. Federation of Civic Associations* v. *Volpe*, 316 F.Supp. 754, 762 (D.D.C. 1970)).

[24] *Id.* at 1246 (emphasizing that "[i]n my view, the District Court clearly and unambiguously found as a fact that the pressure exerted by Representative Natcher and others did have an impact on Secretary Volpe's decision to approve the bridge").

[25] 408 F. Supp. 303 (W.D. Tex 1976).

[26] *Id.* at 306.

[27] *Id.* at 313.

particular note is *Sierra Club* v. *Costle*,[28] where the D.C. Circuit found no taint of the rulemaking proceeding there for failure to docket post-comment period meetings with the Senate majority leader. In *Sierra Club* the D.C. Circuit solidified its view that rulemaking proceedings involving general agency policymaking are more akin to the legislative process and, therefore, courts should exercise caution in attempting to probe too deeply. The court held that before an administrative rulemaking could be overturned simply on the grounds of political pressure, there had to be a showing that "the content of the pressure on the [decisionmaker] is designed to force him to decide upon factors not made relevant by Congress in the applicable statute" and also that the determination made "must be affected by those extraneous considerations."[29] Although there was evidence in *Sierra Club* that the meetings were called at the behest of the Senate Majority leader "to express 'strongly' his views"[30] on the subject of the rulemaking, the court found that the agency made no commitments to him, nor was there evidence that he used "extraneous" pressures to further his position. Furthermore, the court characterized the Senator's efforts, since they were exerted in a rulemaking proceeding, as within the accepted boundaries of the political process.

Since *Pillsbury*, it appears that only two courts have actually overturned a quasi-judicial agency proceeding on grounds of undue political influence.[31] The majority of post-*Pillsbury* judicial rulings involving challenges to agency adjudications have evinced a clear predilection to defer to congressional actions where they involve the legitimate exercise of legislative oversight and investigative functions.[32] For example, in *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*,[33] the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) dealt with the effects of a Senator's conduct at prior congressional investigations relating to the debarment of government contractors convicted of bid-rigging and similar offenses, as well as his recommendations and status inquiries contemporaneous with an ongoing debarment proceeding. The plaintiff, the subject of such a debarment proceeding, claimed that the Senator's persistence in the subject area, and his particular interest in its case, compromised the integrity of the administrative proceeding. While acknowledging that during a judicial or quasi-judicial proceeding "pressure on the decisionmaker alone, without proof or effect on the outcome, is sufficient to vacate a decision,"[34] the court held that "[t]he test is whether 'extraneous factors intruded into the calculus of consideration' of the *individual* decisionmaker."[35] Applying that standard, the court found neither actual nor apparent congressional interference since the Senator had never communicated directly with the ultimate decision maker in the debarment, nor was it shown that that official was even aware of the Senator's communications.

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[28] 657 F.2d 298 (D.C. Cir. 1981).

[29] *Id.* at 409.

[30] *Id.* at 409.

[31] *See Koniag v. Kleppe*, 405 F. Supp. 1360 (D.D.C. 1975), *modified sub nom. Koniag v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1052 (1978); *see also Esso Standard Oil Co. v. Freytes*, 467 F.Supp.2d 156 (D. Puerto Rico 2006).

[32] *See, e.g., Gulf Oil Co. v. Federal Power Commission*, 563 F.2d 588 (3d Cir. 1977); *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983); *Power Authority of the State of New York v. FERC*, 743 F.2d 93 (2d Cir. 1984); *State of California v. FERC*, 966 F.2d 1541 (9th Cir. 1992); *ATX, Inc. v. U.S. Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994).

[33] 714 F.2d 163 (D.C. Cir. 1983).

[34] *Id.* at 169.

[35] *Id.* at 170 (emphasis in original).

In the first post-*Pillsbury* case where undue influence was found, *Koniag v. Kleppe*,[36] a federal district court set aside several adjudicatory decisions of the Secretary of the Interior – regarding the eligibility of several villages to receive land and money under the Alaska Native Claims Settlement Act (ANSCA) – because it found improper congressional pressure exerted on the Department of the Interior and the Secretary. In *Koniag*, the improper influence took two forms: First, a congressional subcommittee held oversight hearings on the administration of the ANSCA while the proceedings in question were pending. The district court found that the hearings went substantially beyond the oversight function, concluding that "the entire rule-making process was re-examined, travel vouchers and other information were sought to probe the adequacy of the investigations made, all papers in the pending proceedings were demanded, the accuracy of data and procedures was questioned, and constantly the Committee interjected itself into aspects of the decision-making process."[37] Second, two days before the Secretary made his determination on the eligibility of the villages, the Chairman of the subcommittee sent a letter to him requesting that he postpone his decision on the matter pending a review and opinion by the Comptroller General. The Chairman's rationale for the postponement was because it "appears from the testimony [at the hearings] that village eligibility and Native enrollment requirements of ANSCA have been misinterpreted in the regulations and that certain villages should not have been certified as eligible for land selections under ANSCA."[38] On these facts the district court vacated the Secretary's eligibility decisions and reinstated the decisions initially rendered by the Bureau of Indian Affairs.

On appeal, the D.C. Circuit disagreed in part with the lower court's application of the relevant law, but not with its validity. With regard to the Chairman's conduct of the hearings, the D.C. Circuit found fault with the district court's holding because none of the agency officials present at the hearing and subjected to the Chairman's questioning was an agency decision maker.[39] In so holding, the D.C. Circuit expressly declined to extend the holding in *Pillsbury* to agency employees or advisors. The D.C. Circuit, citing *Pillsbury* approvingly, however, upheld the district court regarding the Chairman's letter. According to the court, the letter "compromised the appearance of the Secretary's impartiality," and thereby tainted the decision.[40]

More recently, in *Esso Standard Oil Company v. Freytes*,[41] the U.S. District Court for the District of Puerto Rico found that the publication of a Puerto Rico Senate Committee Report deprived a gasoline station owner of his right to fair and impartial tribunal.[42] The case was brought against the Puerto Rico Environmental Quality Board (EQB), which was seeking to prosecute a $75 million fine against Esso for a gasoline spill. According to the court, the Puerto Rico Senate Commission on Agriculture, Natural Resources, and Energy and the Puerto Rico Senate Commission on Government Integrity had conducted joint hearings on corruption into the EQB and released a report critical of Esso and the EQB, all while the investigation was pending.[43] The court, with no analysis and relying almost exclusively on *Pillsbury*, held that the "issuance of the Report by the Senate Committee during the ongoing proceedings against

[36] 405 F. Supp. 1360 (D.D.C. 1975), *modified sub nom. Koniag v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1052 (1978).

[37] *Id.* at 1371.

[38] *Id.*

[39] 580 F.2d at 610 (noting that the "one possible exception was Mr. Ken Brown, a close advisor to the Secretary who briefed him on the cases at the time he decided to approve the Board's recommended decisions," but declining to extend *Pillsbury* to mere advisors).

[40] *Id.*

[41] 467 F.Supp.2d 156 (D. Puerto Rico 2006).

[42] *Id.* at 167.

[43] *Id.* at 166.

Esso presents an impermissible appearance of legislative pressure on the adjudicative process."[44] On appeal, the defendants did not challenge the district court's holding with respect to the impact of the Senate report, therefore, the U.S. Court of Appeals for the First Circuit affirmed the lower court's decision.[45]

In sum, since *Pillsbury* it appears that the standard for determining whether undue legislative interference exists depends on the type of agency action at issue. If a proceeding is one in which an agency's judicial or quasi-judicial functions are being exercised, it appears that where the question of undue congressional influence on an agency adjudication is involved, the appearance of impropriety alone may be sufficient to taint the proceeding. To demonstrate an appearance of impropriety, however, the courts arguably have required that the legislative pressure or influence be focused substantially on the mental decisional processes of an agency and be specifically directed at the agency's ultimate decision maker. Alternatively, if the decision making at issue is "purely legislative" or policymaking in nature, such as a rulemaking proceeding, then the standard will be deferential to the political nature of the process. In cases where a decisional process involves application of ascertainable legislative standards by an agency official in a situation that cannot be categorized as either judicial or legislative, *i.e.*, informal decision making, then a claim of impermissible interference will be sustained only on a showing of actual effect. Finally, regardless of the type of administrative action is at issue, it appears that the attempted influence has to relate directly to the merits of the proceeding, and the court, before it will intervene, must conclude that the legislative action in question does not involve an exercise of Congress's legitimate oversight and investigative functions.

Application of the *Pillsbury* Doctrine to Congressional Oversight

A review of congressional precedents indicates that there is no single method or set of procedures for engaging in oversight or conducting an investigation.[46] Historically, congressional committees appeared to rely a great deal on public hearings and subpoenaed witnesses to garner information and accomplish their investigative goals. In more recent years, congressional committees have seemingly relied more heavily on staff level communication and contacts as well as other "informal" attempts at gathering information – document requests, informal briefings, etc. – before initiating the necessary formalistic procedures such as issuing committee subpoenas, holding on-the-record depositions, and/or engaging the subjects of inquiries in open, public hearings.

In response to congressional investigations, particularly at the earlier, "informal" stages, agencies within the executive branch may attempt to assert a claim of "deliberative process" privilege with respect to any information related to the decision-making process of the agency. Assertions of deliberative process privilege by agencies have not been uncommon in the past. In essence, it is argued that congressional demands for information as to what occurred during the policy development process of an agency would unduly interfere, and perhaps "chill," the frank and open internal communications necessary to the quality and integrity of the decisional process. Such a privilege claim may also be grounded on the contentions that it protects against premature disclosure of proposed policies before they are fully considered or

[44] *Id.* at 167.

[45] *Esso Standard Oil Co. v. Lopez-Freytes*, 522 F.3d 136, 148 (1st Cir. 2008).

[46] *See, e.g.*, CONGRESS INVESTIGATES: A DOCUMENTARY HISTORY 1792-1974 (Arthur M. Schlesinger, Jr. & Roger Burns eds. 1975).

actually adopted by the agency, and to prevent the public from confusing matters merely considered or discussed during the deliberative process with those on which the decision was based. However, as with claims of attorney-client privilege and work product immunity, congressional practice has been to treat their acceptance as discretionary with the committee.[47] Moreover, appellate court decisions have affirmed the understanding that the deliberative process privilege is a common law privilege of agencies that is easily overcome by a showing of need by an investigatory body, and other court rulings and congressional practice have recognized the overriding necessity of an effective legislative oversight process.[48]

Nothing in *Pillsbury* or its progeny appears to suggest that the possibility of interfering with the due process of rights of parties to agency action provides an agency with a legal basis for asserting such a deliberative process privilege and/or refusing to cooperate with legitimate congressional oversight requests. As discussed above, the court in *Pillsbury* expressly noted that it "can preserve the rights of the litigants in a case such as this without having any adverse effect upon the legitimate exercise of the investigative power of Congress."[49] Thus, *Pillsbury* appears to strike a balance between Congress's oversight needs and the rights of the participating parties to due process. The conflation with deliberative process privilege, or the elevation of concerns about undue legislative influence to the status of a legal right to withhold information arguably threatens to tilt the carefully crafted balance articulated in *Pillsbury* dramatically in the administrative agency's favor. This is arguably especially true in situations involving administrative agencies, which receive the legal authority to engage in decision making, whether adjudicatory, policymaking, or otherwise, directly from Congress, via delegated authority. In other words, because the legal authority for the agency to act emanates from a statutory delegation from Congress that can be amended or revoked at any time, Congress's ability to inquire as to the process and methods used by the agency to exercise its delegated authority is arguably at it zenith, even if the exercise of such ability may be used to invalidate the agency's final decision.

A simple hypothetical serves to illustrate this potential concern. Assume that a congressional committee informally requests information about a pending agency adjudicatory action. Specifically, the committee is interested, not in the outcome of a particular decision, but rather in the agency's interpretation of the legal basis for pursuing the adjudication as well as the agency's understanding of the applicable law. As a result, the committee requests documents from the agency to that end, but does not at this point intend to hold hearings, meet with agency decision makers, or submit interrogatories directly to anyone participating in the pending action.

Agencies can and often do respond to these types of requests by asserting the "deliberative process privilege," arguing that the disclosure of such documents would have a chilling effect on the agency's ability to consider alternative legal interpretations and debate all possible outcomes. At this point, however, it does not appear that application of the *Pillsbury* Doctrine has been triggered. Mere requests for information that may relate to a pending agency decision, even using a hypothetical adjudicatory decision where the standard for interference is the mere appearance of impropriety, without more do not appear to be the type of actions that lead courts to invalidate the agency decisions in *Pillsbury*, *Koniag*, or *Esso*. Information requests arguably do not focus on the mental decision making process of the agency, nor in the hypothetical were they directed at the decision makers themselves. In fact, the hypothetical does not even contemplate the involvement of the actual decision makers. CRS was able to locate no court decision holding that the transmission of information, even internal deliberative information alone,

[47] *See generally*, CRS Report 95-464, Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry, by Morton Rosenberg (available upon request).

[48] *See, e.g., In Re Sealed Case (Espy)*, 121 F. 3d 729 (D.C. Cir. 1997).

[49] *Pillsbury*, 354 F.2d at 964. (citing *United States v. Morgan*, 313 U.S. 409 (1941)).

without more, would constitute undue legislative influence. Moreover, even if the agency were to believe that such a request is in violation of *Pillsbury*, the claim of undue influence is not the agency's to raise. Rather, it would be raised by the private party to the agency's action, in a federal court, after the agency had rendered a final decision. Neither the Congress, nor the requesting committee, is a party to that litigation. While the agency remains free to express its view that such a request by the committee may lead to litigation alleging a violation of due process, such a possibility does not appear to have any bearing on the agency's obligation to cooperate with the committee or face potential compulsory process or contempt proceedings. Thus, similar to claims of common-law privileges, such as deliberative process, congressional practice suggests that the acceptance of an agency's decision not to cooperate based on a potential *Pillsbury* claim, is arguably at the committee's sole discretion.

To further buttress the conclusion that the decision to honor an invocation of *Pillsbury* is discretionary with the investigating committee, an analogy might be made to the congressional inquiries into matters where criminal or civil litigation is currently pending. In 1941, Attorney General Robert Jackson famously articulated numerous reasons – some of which are akin to those raised by the both deliberative process privilege and the *Pillsbury* Doctrine – for declining to provide information to Congress about open and closed civil and criminal proceedings.[50] The reasons included avoiding prejudicial pre-trial publicity, protecting the rights of innocent third parties, protecting the identity of confidential informants, preventing disclosure of the government's strategy in anticipated or pending judicial proceedings, avoiding the potentially chilling effect on the exercise of prosecutorial discretion by Department of Justice attorneys, and precluding interference with the President's constitutional duty to faithfully execute the laws all of which would "seriously prejudice law enforcement."[51]

A review of the case law in this area suggests that the courts have recognized the potentially prejudicial effect congressional hearings can have on pending cases.[52] While not questioning the prerogatives of Congress with respect to oversight and investigation, the cases pose a political choice for the Congress. On one hand, congressionally generated publicity may result in harming the prosecutorial effort of the Executive. Conversely, access to information under secure conditions can fulfill the congressional power of investigation and at the same time need not be inconsistent with the authority of the Executive to pursue its case. Although powerful arguments may be made on both sides, the decision to pursue a congressional investigation of pending civil or criminal matters remains a choice that is solely within Congress' discretion to make, irrespective of the consequences. As the Iran-Contra Independent Counsel observed "[t]he legislative branch has the power to decide whether it is more important perhaps to destroy a prosecution than to hold back testimony they need. They make that decision. It is not a judicial decision, or a legal decision, but a political decision of the highest importance."[53]

Just as the impact of an investigation on pending civil or criminal litigation may be raised only as a reason Congress should not pursue a line of inquiry, *Pillsbury* may be raised as a reason for Congress to avoid investigation into administrative decision making. Neither rationale rises to the level of a legal privilege nor can either legally prohibit Congress's use of its oversight authority. Congressional committees, however, under certain circumstances, may find them persuasive and elect to honor the agency's request and withdraw its inquiry.

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[50] 40 OP. ATTY. GEN. 45 (1941).

[51] *Id.* at 46-47.

[52] *See* CRS Report RL34197, *Congressional Investigations of the Department of Justice, 1920-2007: History, Law, and Practice*, by Morton Rosenberg at 16-18 (available upon request).

[53] Lawrence E. Walsh, *The Independent Counsel and the Separation of Powers*, 25 HOUS. L. REV. 1, 9 (1988).